

1 UNITED STATES DISTRICT COURT
 2 SOUTHERN DISTRICT OF FLORIDA
 3 WEST PALM BEACH DIVISION
 4 CASE NO. 16-CV-80655-ROSENBERG

5 **JAMES TRACY,**

6 Plaintiff,

7 vs.

8 **FLORIDA ATLANTIC UNIVERSITY** . West Palm Beach, Florida
BOARD OF TRUSTEES,

9 December 5, 2017

10 Defendant.

11 VOLUME 5

12 JURY TRIAL PROCEEDINGS
 13 BEFORE THE HONORABLE ROBIN L. ROSENBERG
 14 UNITED STATES DISTRICT JUDGE

15 APPEARANCES:

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1 *THE COURT:* Good morning. All of our jurors here.

2 Diane Alperin, you may return to the stand.

3 *MS. GRIFFIN:* Your Honor, we may want to address one
4 issue before the jurors come in.

5 *THE COURT:* What was that?

6 *MS. GRIFFIN:* There was an exhibit, Plaintiff's
7 Exhibit 5, I understand Plaintiff continues to go forward with
8 that, and also the university requests for production. Exhibit
9 5 has not been authenticated, they are screen shots the
10 Plaintiff printed out himself, and that is the same conduct
11 that the Court ordered for the similarly situated issue, and we
12 filed a brief this morning that they will be calling witnesses
13 for similarly situated issues. That brief is at DE 424.

14 *THE COURT:* Okay, the brief was filed six minutes ago;
15 is that right?

16 *MS. GRIFFIN:* Yes, your Honor.

17 *THE COURT:* Exhibit 5 is something called the
18 progressive profiles or -- it is not in evidence, it was
19 marked.

20 I thought Plaintiff said Plaintiff wasn't attempting
21 to get that into evidence. Is that correct?

22 *MR. BENZION:* That is correct, I do not intend to get
23 into that today, either.

24 *THE COURT:* What are you going to ask the witness?
25 Describe the exhibit for me.

1 MR. BENZION: The exhibit is a composite of blogging
2 activities online by other professors at the university.

3 THE COURT: Why don't you tell me the nature of the
4 questions you would ask the witness.

5 MR. BENZION: I was not planning on referring to that
6 exhibit unless necessary. Essentially, I will ask her about
7 the search she conducted into the individuals' files and the
8 report of outside employment forms that she did not find for
9 these individuals and that is essentially it.

10 THE COURT: You are going to ask her about other
11 professors who have other activity that may or may not include
12 blogging, and what other steps did she take to look into it?

13 MR. BENZION: Yes.

14 THE COURT: The exhibit doesn't play any role into
15 that other than what -- can you ask her questions without
16 referring to that exhibit?

17 MR. BENZION: I do not intend to refer to that
18 exhibit.

19 MS. GRIFFIN: The same thing with the request for
20 production, they presented these with the individuals and
21 issued a request for production. They are asking her to talk
22 about searches that she ran at our direction.

23 THE COURT: Are you planning on asking her about the
24 request for production?

25 MR. BENZION: I am planning to ask about the facts of

1 these individuals she searched.

2 *MS. GRIFFIN:* That is in the request for production.

3 *MR. BENZION:* The request for production is marked, I
4 intend to use it for recollection if she needs it.

5 *THE COURT:* Asking about other persons' activity, what
6 activities they may have had and what efforts the witness made
7 to look into them?

8 *MR. BENZION:* Right.

9 *THE COURT:* Is that acceptable?

10 *MS. GRIFFIN:* As long as they lay the foundation.

11 *MR. CURLEY:* The standing objection as to the
12 similarly situated notice, your Honor.

13 *THE COURT:* Yes, that objection is noted.

14 (Thereupon, the jury returned to the courtroom).

15 *THE COURT:* Good morning, everyone. We have a new
16 seating order. Everybody comfortable with this?

17 Yes, those not feeling well, are you feeling better?
18 Is it a little chilly.

19 *THE JURORS:* We have sweaters.

20 *THE COURT:* Everyone feel free to bring beverages in
21 and we have enough Kleenex, and ginger tea, take that up, it is
22 ginger crystals, and they work.

23 Welcome back. Does everyone want ginger tea? Maybe
24 it could be arranged if we see sniffles.

25 With that, Dr. Alperin is still on the stand and she

1 remains under oath, and we discussed that there would be no
2 more than 15 minutes additional questioning by the Plaintiff.

3 So, you may resume at this point.

4 MR. BENZION: May I approach the witness?

5 THE COURT: Yes.

6 **DIRECT EXAMINATION** continued

7 BY MR. BENZION:

8 Q. Handing the witness 37 good.

9 Dr. Alperin, this document is an email you received with a
10 list of links of news articles about FAU's firing of Professor
11 Tracy, yes?

12 A. That is what it appears to be.

13 MR. BENZION: I move in 37-G.

14 THE COURT: Any objection?

15 MS. GRIFFIN: No objection.

16 THE COURT: 37-G is admitted without -- let me make
17 sure I see 37-G. Okay.

18 MR. BENZION: And may we publish?

19 THE COURT: Yes. Admitted without objection.

20 (Whereupon Plaintiff Exhibit 37-G was marked for evidence.)

21 BY MR. BENZION:

22 Q. At this time, there were so many articles published about
23 FAU's firing that your press office created a roundup of all of
24 the articles; is that true?

25 A. That is what this appears to be. They do send clips every

1 day.

2 Q. I see an article here from the International Business
3 Times. So, FAU's issues with Tracy made international news in
4 2015, just like 2013, right?

5 A. That is what the list seems to show.

6 Q. Of all of the articles published in 2015, did you have a
7 favorite article?

8 A. I don't recall reading all of these articles.

9 Q. If I showed you a document, that might refresh your
10 recollection as to which article was your favorite?

11 A. You could show it to me, yes.

12 MR. BENZION: May I approach?

13 THE COURT: Yes.

14 MR. BENZION: Showing the witness what is marked 37-L.

15 THE COURT: You are just having that marked, 37-L?

16 MR. BENZION: I may be moving that into evidence in a
17 moment here, your Honor.

18 THE COURT: Okay.

19 BY MR. BENZION:

20 Q. Please review that document and when you are done, look up
21 at me, please.

22 (Pause.)

23 A. Yes.

24 Q. Did that document refresh your recollection as to which
25 article was your favorite article at this time, in 2015?

1 A. I am not sure why I thought that at that time. I suspect
2 that reading it this morning, that I liked the idea that this
3 was mentioning academic responsibility as well as academic
4 freedom.

5 Q. You are referencing what the article said, right?

6 A. Yes.

7 Q. And you wrote an email to somebody that you are looking at?

8 A. Correct.

9 Q. And you said that article was your favorite, right?

10 MS. GRIFFIN: Objection, your Honor, hearsay.

11 MR. BENZION: Your Honor, at this time I move this
12 into evidence. It is an admission by a party, and the witness
13 opened the door in reference to the articles favorable to her.

14 MS. GRIFFIN: I think we should approach.

15 MR. BENZION: I do, too.

16 THE COURT: We can approach. Bring a copy of the
17 exhibit.

18 (Proceedings at sidebar.)

19 THE COURT: Do you have a copy of the exhibit?

20 Let me look at it.

21 The top part is an email from Alperin to somebody by
22 the name of Nick that is dated December 18, 2013. That would
23 be a statement of all principals. Is that being objected to?

24 MS. GRIFFIN: Yes.

25 MR. FEICHT: Sending Nick her favorite article is not

1 established within the scope of her employment.

2 *THE COURT:* Tell me who Nick is.

3 *MR. FEICHT:* I don't know.

4 *MS. GRIFFIN:* I believe Nick is a former colleague or
5 friend, this is someone with an AOL account.

6 *THE COURT:* The point is -- I will let the Plaintiff
7 be heard in a moment -- the email was not within her scope of
8 her duties as Vice Provost?

9 *MS. GRIFFIN:* Right, this is a personal activity.

10 *THE COURT:* The next email is from Lisa Metcalf to
11 whom?

12 *MS. GRIFFIN:* It doesn't identify and contains a Sun
13 Sentinel article that is hearsay.

14 *THE COURT:* What is the response?

15 *MR. BENZION:* Diane Alperin is a party opponent, it is
16 an admission by a party opponent.

17 *THE COURT:* Just a moment. Is there any requirement
18 that be within the scope of -- it is not should, the rules of
19 evidence would provide for that.

20 Okay, I am not sure if it is not coming in made by a
21 party's agent or employee on a matter within the scope. That
22 she is a party opponent, that is not necessarily a requirement.
23 Does Defense agree?

24 *MS. GRIFFIN:* She is not a party anymore, she is here
25 as a corporate representative. As an individual employee, if

1 it is not within the scope of her employment, it is not within
2 the scope.

3 *MR. FEICHT:* She was formerly a party, now she is not.

4 Like with the other ones, this is within the scope to
5 do this. Sending friends your favorite articles, that has not
6 established the foundation, and that does require through a
7 party's agent such as Dr. Alperin to be within the scope.

8 *THE COURT:* All right.

9 *MR. BENZION:* I am not conceding this is an email sent
10 not within the scope of her employment. She is Vice Provost,
11 whether she is talking to an employee or another, this is an
12 adopted admission.

13 *THE COURT:* Lower your voice.

14 *MR. BENZION:* But before that, before we get to the
15 adopted admission, it is a straight admission by a party
16 opponent. She is a party to the case, she has not been
17 dismissed --

18 *THE COURT:* Is she or not a party?

19 *MR. FEICHT:* Summary judgment was granted in her
20 favor.

21 *THE COURT:* She is not a party to the case.

22 *MR. BENZION:* We argue she is. If that is the
23 Court's --

24 *THE COURT:* She has been dismissed in a summary
25 judgment order.

1 *MR. BENZION:* There is not a final judgment ordered
2 dismissing her. I understand the Court's position on that.
3 That is the argument.

4 Additionally, she opened the door with the rest of
5 this. We say this is an admission, an adopted admission. The
6 rest is not offered for the truth, it is offered for the effect
7 on the listener and bias of the Plaintiff. This is a decision
8 maker who just fired the Plaintiff and reading an article
9 saying the Plaintiff's speech embarrassed FAU so much they were
10 right to fire her, that is her favorite article.

11 *THE COURT:* Okay, got it.

12 *MS. GRIFFIN:* This is after the decision was made to
13 terminate his employment. Nothing indicates the university
14 adopted her statement, and opening the door applies to
15 relevance, not hearsay.

16 The fact that she answered his question why this would
17 be her favorite article does not open the door.

18 *MR. BENZION:* May I make one last --

19 *THE COURT:* I heard enough.

20 *MR. BENZION:* It wasn't totally post firing.

21 *THE COURT:* I understand that, respect that.

22 I made a ruling. It does not come in as hearsay. I
23 think I have been fairly consistent as relates to all of the
24 type of arguments that it not come in for the truth of the
25 matter, it is clearly hearsay. The article does not come in.

1 It does not say to whom it was sent, that is Lisa Metcalf's
2 email.

3 As to the email of Diane Alperin, she is not a party
4 opponent. It would come in under, if it came in at all,
5 801(d)(2)(D) and it -- I don't even know how it is relevant
6 anymore, if the article is not coming in, for her to say this
7 is my favorite. I am not sure who Nick is and her commenting
8 on an article would not appear -- from everything the Court has
9 heard about her duties and responsibilities at FAU, would not
10 come within, you know, the scope of her duties. It is an
11 opinion about an article, and which one she liked and which one
12 she didn't.

13 In any event, the Court sees no relevance because the
14 article is not coming in, I am not going to allow the email.
15 You can have 37-L marked. It will not preclude you from asking
16 questions as long as you don't delve into the content of the
17 article. If you want to explore questioning that you think
18 arises from the article without pointing to the article, you
19 are free to probe about biases and motives, I am not precluding
20 you from doing it. I will not let inadmissible evidence come
21 into the trial.

22 MR. BENZION: I would ask we strike the last
23 testimony. I asked if the document refreshed her recollection,
24 and she began to say what parts of the favorite one made it
25 favorable to her. I can't reference it any more, the answer

1 should be stricken and the jury should not be able to consider
2 that.

3 MS. GRIFFIN: The question prior to that to which she
4 was refreshing her recollection is whether she had a favorite
5 article.

6 THE COURT: I doubt at this point the jury even
7 remembers what the final question was.

8 What I will go back out and say, 37-L is not admitted
9 and we will have it marked and proceed with your questioning.

10 MR. BENZION: Okay, thank you.

11 (Sidebar concluded.)

12 THE COURT: Okay. So, 37-L is marked for
13 identification only and not admitted into evidence for the
14 reasons stated.

15 (Whereupon Plaintiff Exhibit 37-L was marked for
16 identification.)

17 THE COURT: Counsel may proceed when you are ready.

18 BY MR. BENZION:

19 Q. Dr. Alperin, in December 2015, you agreed Dr. Tracy's
20 tenured status did not protect him when he made embarrassing
21 comments about FAU; isn't that true?

22 A. It had nothing to do with the comments he made. I didn't
23 believe that. Restate the question.

24 Q. In December 2015, you believed since Dr. Tracy was tenured,
25 that did not protect him because he made embarrassing comments

1 to FAU?

2 A. I do believe he had First Amendment rights to make the
3 comments. I did not believe -- I am confused by the question,
4 I'm sorry.

5 Q. You know what tenure is, right?

6 A. Yes.

7 Q. You know what the freedom of speech is, right?

8 A. Yes.

9 Q. So, did you believe, in December 2015, that the mere fact
10 that Professor Tracy had tenure and he had the freedom of
11 speech, that did not protect him if he was making offensive and
12 embarrassing comments?

13 MS. GRIFFIN: Objection, cumulative.

14 THE COURT: Overruled.

15 THE WITNESS: The termination did not have anything to
16 do with his speech.

17 BY MR. BENZION:

18 Q. Do you not want to say what you believed?

19 A. I said what we believe, he did have a right to speech, he
20 was never stopped about blogging, he was never told what to
21 teach in the classroom.

22 Q. You didn't do those things because the law prevents you
23 from doing that, right?

24 MS. GRIFFIN: Objection, calls for a legal conclusion.

25 THE COURT: Sustained.

1 BY MR. BENZION:

2 Q. You understand, as Vice Provost of Florida Atlantic
3 University, you cannot fire Professor Tracy for his speech,
4 right?

5 A. It was my opinion that that was not the action to take,
6 fire him for his speech. We didn't take action against him for
7 his speech in 2013. He was allowed to continue his blog.

8 Q. You tried to get him to report it to you so you could
9 approve it or disapprove it in 2013; isn't that true?

10 MS. GRIFFIN: Objection, mischaracterizes her
11 testimony.

12 THE COURT: Sustained.

13 BY MR. BENZION:

14 Q. When you ask somebody to report an activity to you, that
15 means once they report it, you would have the up or down vote,
16 approve or disapprove of that activity, right?

17 A. We go through a process, it would be up to the chair, the
18 director and dean, and Vice Provost, yes.

19 Q. The answer is yes, you would have a right to approve or
20 disapprove of the activity, right?

21 A. I could.

22 Q. In 2013, you wanted him to report his blogging to you so
23 you could have the right to approve or disapprove that
24 activity, didn't you?

25 A. Correct.

1 Q. You wanted that same right in 2015, to approve or
2 disapprove the activity?

3 A. Correct.

4 Q. Are you here telling this jury today if he reported the
5 blogging to you in 2013 or 2015, you would have said he could
6 keep blogging?

7 A. Possibly, yes.

8 Q. Possibly not?

9 A. It would not have to do with the content of the blog.

10 Q. So you say?

11 A. I do say, yes.

12 Q. I will read a list of names to you, Doctor, and I will ask
13 you a questions about those particular individuals, all right?
14 Heather Coltman, Diane Alperin, David Williams, Robert Rabil,
15 Joey Bardston, Ashton Kennedy, Mark Scrogins, Chris Robe, Doug
16 McGetchin, Shane Eason, Christopher Strain, Michael Hamilton
17 and Linda Johnson.

18 Do you recognize those names?

19 A. Yes.

20 Q. Those are employees, including faculty and deans, at
21 Florida Atlantic University?

22 A. Yes.

23 Q. During the course of the litigation you searched those
24 individuals' files for certain documents?

25 A. I searched their credential file, the file is in the

1 Provost's office.

2 Q. Why did you search that?

3 A. It was part of the public records request.

4 Q. No, it was part of a request that you tried to find a
5 report of outside employment.

6 MS. GRIFFIN: Objection, counsel is testifying.

7 THE COURT: Rephrase. Rephrase the question.

8 BY MR. BENZION:

9 Q. So, you searched those credential files, right?

10 A. Right.

11 Q. For report of professional employment/activity forms?

12 A. Yes.

13 Q. You found a couple, you found a few?

14 A. I suspect.

15 Q. You didn't find any reported professional activity forms
16 for blogging for any of these individuals, right?

17 A. I don't recall.

18 Q. If I were to show you something might that refresh your
19 recollection?

20 MR. BENZION: May I approach?

21 THE COURT: Yes. What are you showing?

22 MR. BENZION: Her deposition, Volume 2, July 28, 2017,
23 page 182, line 15, through 184, line 18.

24 BY MR. BENZION:

25 Q. When you are done, please look up at me so I know you read

1 that section.

2 (Pause.)

3 *MS. GRIFFIN:* Your Honor, we object to a lack of
4 foundation whether or not these professors that have been
5 listed actually had activities that included blogging.

6 *THE COURT:* Okay, you have to lay the foundation with
7 the witness before you ask the questions as to whether she knew
8 or not before she testifies about it.

9 *MR. BENZION:* Your Honor, I am asking her whether she
10 found any documents related to these activities in the file.
11 Not -- I am not asking her if she knows what they were doing, I
12 am asking if there are forms she searched for --

13 *THE COURT:* Unrelated or related to blogging.

14 *MR. BENZION:* Any forms, correct.

15 *THE COURT:* All right. I will allow that question.

16 *THE WITNESS:* Okay.

17 *BY MR. BENZION:*

18 *Q.* Okay, that refreshed your recollection as to whether or not
19 you found reported outside employment/professional activity
20 forms in these particularly named employees' files, right?

21 *A.* For those years.

22 *Q.* 2013, 14, 15?

23 *A.* Correct.

24 *Q.* And you only found a few, right?

25 *A.* Correct.

1 Q. You found one for Doug McGetchin?

2 A. Yes.

3 Q. And then two for Heather Coltman?

4 A. Yes.

5 Q. You didn't find any for these individuals --

6 A. This said I also found one for Feinman.

7 Q. But it wasn't related to blogging activities, social media,
8 online activities?

9 A. I don't remember. I only know what I found.

10 Q. You can't sit here and say you found a form for that
11 individual or any others relating to blogging, right?

12 A. Correct.

13 Q. You also did not find any notices of discipline in these
14 individuals' files, right?

15 MS. GRIFFIN: Objection, your Honor, foundation, he
16 hasn't established that there would have been grounds for this.

17 MR. BENZION: I don't need to establish that.

18 THE COURT: I will allow the question and then on
19 cross, if you want to followup on that, you may.

20 THE WITNESS: I don't recall whether I found any. I
21 don't believe I found any.

22 BY MR. BENZION:

23 Q. You found --

24 A. Discipline.

25 Q. You conducted this search several months ago?

1 A. Correct.

2 Q. Since conducting this search, you did not do any
3 investigation into any of the activities, right?

4 A. It is not my responsibility at this time.

5 Q. Not your responsibility to make sure the policies of the
6 university are being complied with?

7 A. I referred it to the current Vice Provost.

8 Q. You told somebody else to look into the individuals' files?

9 A. I am saying that I spoke to the Vice Provost.

10 Q. About these individuals?

11 A. I don't remember whether it was about these individuals or
12 about the pages that you had showed me at the deposition, that
13 it was her responsibility to followup, and not mine.

14 Q. What did she report back to you?

15 A. She reported back that some of these were part of their
16 assignment and some of these didn't appear to be an issue.
17 That is what she told me.

18 Q. She told you the online activities that those professors
19 had weren't an issue, right?

20 A. That is what she told me.

21 Q. And didn't need to be reported?

22 A. She told me that was part of their assignment.

23 Q. So wasn't an issue?

24 A. Wasn't an issue.

25 Q. And that meant they did not need to be reported, right?

1 A. I don't know.

2 MR. BENZION: No further questions, your Honor.

3 THE COURT: Okay, thank you.

4 All right. Cross-examination, and if you change into
5 direct examination at any time and you are able to notify the
6 Court of that transition, please try to do so.

7 **CROSS-EXAMINATION**

8 BY MS. GRIFFIN:

9 Q. Good morning, Dr. Alperin.

10 Dr. Alperin, yesterday afternoon you were asked a number of
11 questions about Dr. Tracy's refusal to submit activity reports?

12 A. Yes.

13 Q. Dr. Tracey was not the only faculty member not completing
14 activity reports, was he?

15 A. Correct.

16 Q. What happened to the other faculty member?

17 A. She was terminated.

18 MS. GRIFFIN: Your Honor, may I approach the witness?

19 THE COURT: Yes.

20 BY MS. GRIFFIN:

21 Q. Doctor, I am going to hand you what is marked as
22 Defendant's Exhibit 206.

23 Dr. Alperin, who issued the proposed discipline termination
24 to that other faculty member?

25 A. Dean Coltman.

1 Q. And Ms. Copeland was also terminated for insubordination,
2 correct?

3 A. Correct.

4 Q. Dr. Alperin, you were asked a number of questions about a
5 email from Dean Ilyas yesterday. I am going to hand you back
6 Plaintiff's 26.

7 THE COURT: Defendant's 206, you are having it marked?

8 MS. GRIFFIN: Yes, your Honor.

9 THE COURT: All right. Marked for identification
10 only.

11 (Whereupon Defense Exhibit 206 was marked for
12 identification.)

13 BY MS. GRIFFIN:

14 Q. Dr. Alperin, going back to Exhibit 206, you have in your
15 hands there a packet. Can you explain what you have in your
16 hands?

17 A. It's an email from me to Dean Ilyas --

18 Q. No, 206, sorry. Going back one.

19 THE COURT: Is this Plaintiff or Defendant.

20 MS. GRIFFIN: Defense 206.

21 THE COURT: Okay.

22 THE WITNESS: Yes, this is the letter of proposed
23 termination to the faculty member in the College of Arts and
24 Letters, notice of termination and the instructor's attempt to
25 resign.

1 BY MS. GRIFFIN:

2 Q. Dr. Alperin, when faculty members are disciplined at the
3 university, are those disciplinary notices sent in writing?

4 A. Yes.

5 Q. Do you maintain copies of those disciplinary notices in the
6 faculty member's credential file?

7 A. For me, it would be the credential file.

8 Q. Does the university keep these files in the ordinary course
9 of business?

10 A. Yes.

11 MS. GRIFFIN: We would like to move in 206 as a
12 business record.

13 THE COURT: Any objection?

14 MR. BENZION: Hearsay.

15 THE COURT: There is an exception laid as a business
16 record under 803 -- let me find it. 803(6) and 803(7),
17 regularly conducted activity. 803(6).

18 Any objection to that?

19 MR. BENZION: No, your Honor.

20 THE COURT: 206 is admitted without objection.

21 (Whereupon Defense Exhibit 206 was marked for evidence.)

22 MS. GRIFFIN: Your Honor, may I publish to the jury?

23 THE COURT: Yes.

24 BY MS. GRIFFIN:

25 Q. Let's flip back to the Notice of Proposed Discipline.

1 Dr. Alperin, with Ms. Copeland, did she check the box and
2 accept her annual assignment?

3 A. I believe so.

4 Q. Did she at that time submit outside activity reports?

5 A. No.

6 Q. Wasn't she then asked to do so by her direct supervisor?

7 MR. BENZION: Objection, lack of personal knowledge.

8 THE COURT: You want to respond or lay a foundation?

9 MS. GRIFFIN: I can lay a foundation, your Honor.

10 THE COURT: Okay.

11 BY MS. GRIFFIN:

12 Q. Dr. Alperin, were you aware of Ms. Copeland's termination
13 at the time it occurred?

14 A. Yes, I talked to Dean Coltman about it.

15 Q. Did Ms. Copeland's supervisor ask her to specifically
16 submit activity records?

17 A. That is my understanding.

18 Q. Isn't it true Ms. Copeland also submitted incomplete forms
19 that did not report all of her outside activities?

20 A. Correct.

21 Q. It looks like here, if you take a look at what is on the
22 board, she also submitted two outside activity reports when
23 directed to do so, correct?

24 A. Correct.

25 Q. And to your knowledge, was the university aware of other

1 outside activities that she had not reported when asked to do
2 so?

3 A. Yes.

4 Q. And is that the reason Ms. Copeland was terminated?

5 A. Yes.

6 Q. If we could flip to the second page.

7 Dr. Alperin, if you could look at the second full paragraph
8 there. Dr. Alperin, going back to Professor Tracy's
9 termination, when you prepared his notice of proposed
10 discipline termination, did you consider the university's
11 regulations relating to university standards?

12 A. Yes.

13 Q. Did you specifically consider 5.0124, employee standards?

14 A. Yes.

15 Q. I know there is a lot of numbers here, but do you recall
16 whether you considered any of these same letters -- I can get
17 you Dr. Tracy's here, let me do that.

18 This is Defendant's Exhibit 29 which is in evidence.

19 Dr. Alperin, if you'd flip to the bottom of the second
20 page?

21 A. Okay.

22 Q. What regulations did you consider when deciding to
23 terminate Professor Tracy's employment or proposing termination
24 for Professor Tracy's employment?

25 A. Section B, Section V and Section OO.

1 Q. Doctor, do Sections B, V and OO appear as the regulations
2 that were considered in Ms. Copeland's termination?

3 A. Yes.

4 Q. Now we can turn to Plaintiff's Exhibit 26, that is the
5 second email I handed you.

6 MS. GRIFFIN: May I publish, your Honor? It is in
7 evidence.

8 THE COURT: Plaintiff's 26, is it in evidence?

9 MS. GRIFFIN: Yes.

10 THE COURT: Yes, you may.

11 BY MS. GRIFFIN:

12 Q. Is it unusual for someone to ask whether a specific
13 activity is reportable?

14 A. No.

15 Q. It is encouraged, isn't it?

16 A. Yes.

17 Q. If the chair doesn't have an answer, what should they do?

18 A. They could ask their dean.

19 Q. If we scroll down, Dr. Ilyas is taking faculty questions up
20 the chain to you?

21 A. Yes.

22 Q. Is there anything wrong with that?

23 A. No.

24 Q. No one dean is responsible for knowing the ins and outs of
25 every single policy, are they?

1 A. Correct.

2 Q. We talked a little bit about the idea of a book.

3 In your experience, do faculty members usually report books
4 as part of their annual assignment?

5 A. Yes.

6 Q. I believe if we scroll down to number three here, Doctor,
7 Dean Ilyas asked you about a book, and I believe -- was this
8 book part of the faculty member's annual assignment?

9 A. I believe, yes.

10 MR. BENZION: Objection, lack of personal knowledge.

11 THE COURT: What was the response?

12 MS. GRIFFIN: She testified yesterday she had a
13 conversation with Dean Ilyas about these questions in advance,
14 your Honor.

15 MR. BENZION: The testimony yesterday was that she
16 believed, she couldn't really remember if this was related to
17 that faculty member.

18 THE COURT: You can review the foundation with the
19 witness.

20 BY MS. GRIFFIN:

21 Q. Dr. Alperin, before Dean Ilyas sent you this, did you have
22 a conversation with him?

23 A. Yes.

24 Q. Did he ask you about a book from a faculty member?

25 A. I believe so.

1 Q. Was that reported as part of the faculty member's annual
2 assignment?

3 A. I believe so.

4 Q. If it is part of the faculty member's work for the
5 university, an inside activity, that does not have to be
6 reported on the report of outside employment or professional
7 activity form, correct?

8 A. Correct.

9 Q. Could you explain to the jury what an annual assignment is?

10 A. A faculty member, prior to the beginning of the academic
11 year, is given an assignment in FAIR, it lists instruction,
12 which is the courses that they are proposed to teach for the
13 fall and the spring semester, it may have other activities in
14 regard to instruction, such as developing a new course, and
15 there is a section for research, creative activity.

16 It is listed what they are expected to work on during the
17 academic year and then there is a section for service, and a
18 faculty member has responsibility for the service within their
19 department, the college, university, and sometimes in their
20 professional organization.

21 There is also, I believe, a section for administration for
22 people who may be doing administration or other kinds of
23 things.

24 MS. GRIFFIN: If I may approach, I am going to hand
25 the witness Defendant's Exhibit 80. Defendant's Exhibit 80 is

1 the mirror image of what is already in evidence as Plaintiff's
2 32-E-1, so I ask it been moved into evidence.

3 *THE COURT:* Any objection?

4 *MR. BENZION:* No objection.

5 *THE COURT:* Defendant's 80 admitted without objection.

6 *MS. GRIFFIN:* May I publish?

7 *THE COURT:* Yes.

8 (Whereupon Defense Exhibit 80 was marked for evidence.)

9 *BY MS. GRIFFIN:*

10 *Q.* Dr. Alperin, this is a signed copy -- or a copy of the hand
11 signed annual assignment Dr. Tracy submitted instead of
12 checking the box in October 2015, correct?

13 *A.* Correct.

14 *Q.* Let's look under research. What is included in Dr. Tracy's
15 research assignment?

16 *A.* Um-m-m --

17 *Q.* We'll blow it up for you.

18 *A.* Do you want me to read it?

19 *Q.* Sure.

20 *A.* "You are encouraged to continue and apply for competitive
21 grants. Your coedited volume" --

22 *Q.* Can you slow down for the Court Reporter.

23 *A.* "There is an expectation of research, scholarly or creative
24 activity in line with the school's annual evaluation and P&T
25 criteria. You are encouraged to continue and apply for

1 competitive grants and other funding avenues to support your
2 research and scholarly works. Your coedited volume, *Governing*
3 *by Crisis*, published by TrinaDay Books, has an anticipated
4 publication date of fall 2016. You should do all required to
5 help the publisher meet this deadline. My understanding is
6 that you also have a chapter in that volume which compounds the
7 importance of moving it into print.

8 "Your article manuscript *Covering Big Jim, Press Coverage*
9 *of District Attorney Jim Garrison's JFK Assassination*
10 *Investigation* is under review for *Radical Criminology*. Should
11 you be directed to revise the manuscript, you should also work
12 to move it into print as soon as possible.

13 "In addition, you have a manuscript titled *Constructing the*
14 *Conspiracy Theory Professor* recently submitted for inclusion as
15 a chapter in *Conspiracy Theories and the People Who Believe*
16 *Them*, a volume edited by Joseph Uscins, publish TBA. This
17 should be ushered through the appropriate revision process
18 toward publication."

19 Q. It doesn't mention Dr. Tracy's contribution to the book
20 *Nobody Died at Sandy Hook*, did it?

21 A. Correct.

22 Q. But was he engaged in other research activity relating to
23 conspiracy theories or mass casualty events, Dr. Alperin?

24 A. It appears so, yes.

25 Q. Does the book, to your knowledge, *Nobody Died at Sandy*

1 Hook, appear to be about mass casualty events?

2 A. Yes. I did not read the book.

3 Q. Was the book relating to Dr. Tracy's professional practice?

4 A. Yes.

5 MR. BENZION: Objection, it does not relate to
6 professional knowledge.

7 THE COURT: Overruled.

8 BY MS. GRIFFIN:

9 Q. Should this book have been reported, Dr. Alperin?

10 A. Yes.

11 MS. GRIFFIN: I will hand the witness Defendant's
12 Exhibit 19 in evidence. May I publish?

13 THE COURT: Yes.

14 BY MS. GRIFFIN:

15 Q. Dr. Alperin, I handed you Defendant's 19. This is a
16 settlement agreement the university entered into with Dr. Tracy
17 in 2013, correct?

18 A. Yes.

19 Q. Looking at the first paragraph, it says that Dr. Tracy
20 agrees not to use his work title in any public communications,
21 correct?

22 A. Correct.

23 Q. And that he will use a disclaimer on the page of actual
24 content in paragraph two, correct?

25 MR. BENZION: Objection, mischaracterization. There

1 are specific activities mentioned here --

2 *THE COURT:* No speaking objections. What is the legal
3 basis?

4 *MR. BENZION:* Mischaracterization of the evidence,
5 your Honor.

6 *THE COURT:* Overruled.

7 *BY MS. GRIFFIN:*

8 Q. And in the settlement agreement, Dr. Tracy also agreed to
9 include a disclaimer on the page of the content, correct?

10 A. Yes.

11 Q. Would this settlement agreement have applied to the book
12 Nobody Died at Sandy Hook?

13 A. I believe so.

14 Q. Dr. Alperin, there were a number of questions yesterday
15 about the note that Dr. Tracy received that his blog was
16 reportable and that he could be terminated for not reporting
17 it. Do you recall that discussion?

18 A. Yes.

19 Q. You provided Dr. Tracy with this notice when you sent him
20 the notice of proposed termination, didn't you?

21 A. Yes.

22 *MS. GRIFFIN:* I'm going to hand the witness
23 Defendant's Exhibit 29, which is in evidence.

24 May I publish?

25 *THE COURT:* Yes.

1 BY MS. GRIFFIN:

2 Q. Dr. Alperin, I want to talk to you about this letter. You
3 prepared this letter, correct?

4 A. Yes.

5 Q. You say here that Dean Coltman recommended disciplinary
6 action to you, correct?

7 A. Correct.

8 Q. And you identify here -- this wasn't the first disciplinary
9 action taken against Dr. Tracy, was it?

10 A. Correct.

11 Q. He had been disciplined with a reprimand in 2015, correct?

12 A. Correct.

13 Q. Was he told in the Notice of Discipline that his failure to
14 comply with its requirements would result in additional
15 disciplinary action?

16 A. Yes.

17 Q. Dr. Alperin, could you read paragraph number three?

18 A. Starting with "you refused"?

19 Q. Yes.

20 A. "You refused her directive and did not submit the activity
21 forms when required. Instead, you sent the dean a letter dated
22 November 22, 2015, in which you presented arguments why you
23 should not have to submit activity forms. Rather than impose
24 further discipline as warned, the dean gave you another
25 opportunity to comply."

1 Q. Was this how you understood the facts at the time you
2 prepared this Notice of Proposed Discipline Termination?

3 A. Yes.

4 Q. So, Dr. Coltman -- Dean Coltman responded to the
5 November 22, 2015 letter on December 11, 2015, didn't she?

6 A. Yes.

7 Q. And provided Dr. Tracy with yet another new deadline to
8 comply with to submit his forms, correct?

9 A. Yes.

10 MS. GRIFFIN: Your Honor, I would like to provide the
11 witness with Defendant's 49. This was admitted into evidence
12 as Plaintiff's 34. I would like to move Defendant's 49 into
13 evidence.

14 THE COURT: Any objection?

15 MR. BENZION: No objection.

16 THE COURT: Admitted without objection.

17 (Whereupon Defense Exhibit 49 was marked for evidence.)

18 BY MS. GRIFFIN:

19 Q. Dr. Alperin, I just handed you the email that Dr. Coltman
20 sent Dr. Tracy offering him another chance to comply, correct?

21 A. Yes.

22 Q. Let's look at this last paragraph here. (Indicating.)

23 Dr. Coltman didn't require Dr. Tracy to just submit forms,
24 correct?

25 A. Correct.

1 Q. She required him to submit complete and accurate outside
2 activity reports, correct?

3 A. Correct.

4 Q. If Dr. Tracy had submitted the fully completed forms, would
5 you have made the decision to send him the notice of proposed
6 termination?

7 A. I would not have sent him that notice, correct.

8 Q. Let's go back to the Notice of Proposed Discipline
9 Termination, Dr. Alperin.

10 Can you explain to the jury a conflict of commitment?

11 A. A faculty member is employed by the state university and
12 has an obligation to fulfill their responsibilities and they
13 shouldn't have conflicting loyalties by doing things outside
14 the university which is partially supported by taxpayer
15 dollars, to do something that will benefit them outside the
16 university.

17 It has to do with loyalty, it has to do with intellectual
18 property and it could have to do with time.

19 Q. And you explained that in this letter, didn't you, Dr.
20 Alperin?

21 A. Yes.

22 Q. Where you wrote "conflict of commitment between university
23 appointment obligations and commitment and externally related
24 or personal activities," correct?

25 A. Yes.

1 Q. Did you have the information that you needed at the time
2 that you sent this letter to determine whether or not Dr.
3 Tracy's outside activities would pose a conflict of commitment?

4 A. No.

5 Q. And you also learned prior to sending this letter that Dr.
6 Tracy used university resources for those outside activities,
7 correct?

8 A. Correct.

9 Q. Was that a violation of the collective bargaining
10 agreement?

11 A. He needed to have gotten approval for the resources. We
12 didn't know about that until he filed those forms.

13 Q. So, Dr. Tracy should have reported the university resources
14 and it could be assessed for approval?

15 A. Correct.

16 Q. Looking at that third paragraph, Dr. Alperin, did you know
17 that Dr. Tracey was using university resources for his outside
18 activities?

19 A. No.

20 Q. Had he previously indicated whether or not he was or was
21 not using university resources?

22 A. I believe in the January 2013 meeting he indicated he was
23 not using university resources.

24 Q. And in his November 22nd response to Dr. Coltman, Dr. Tracy
25 admitted that he was engaging in outside activities, including

1 his blog, correct?

2 A. Correct.

3 Q. And we just discussed Dr. Coltman told Dr. Tracy on
4 December 11th that he needed to submit complete and accurate
5 outside activity reports, correct?

6 A. Correct.

7 Q. And yet, did Dr. Tracy ever report his memoryhole blog?

8 A. No.

9 Q. Let's go to the next paragraph.

10 Dr. Alperin, did you tell Dr. Tracy clearly in this letter
11 that the blog should have been reported?

12 A. I believe so.

13 Q. Who decides whether or not a conflict of interest exists?

14 A. There needs to be a discussion with the faculty member and
15 his supervisor.

16 Q. And so, what options did Dr. Tracy have if he didn't agree
17 that his memoryhole blog was a reportable outside activity?

18 A. I think he had a number of options. First, which I think a
19 lot of people advised him, I think we used the term comply and
20 grieve earlier, he could have filled out the form for the
21 memoryhole blog. If it had not be approved, he could have
22 filed an expedited grievance which is put in place in the
23 collective bargaining agreement for faculty to get a quick
24 response time on outside activities.

25 He could have asked the union, United Faculty of Florida,

1 to file a Chapter 2 grievance. He has indicated in materials
2 that he felt other faculty were involved, that would be a
3 grievance on behalf of all faculty.

4 He could have asked -- if he felt this was undue, he could
5 have asked the university faculty senate, as a due process, he
6 could have asked them to review the situation. He could have
7 responded to this proposed grievance -- proposed Notice of
8 Discipline Termination. He could have -- he could have grieved
9 the termination with the United Faculty of Florida
10 independently or with an attorney.

11 And then ultimately, at the time that this was happening,
12 we had what is referred to in bargaining as an open book, we
13 were bargaining a new collective bargaining agreement. It was
14 open, he could have asked the union to look at Article 5 or 19
15 to make changes.

16 Q. So, he had a number of options available to him?

17 A. Yes.

18 Q. Refusing to comply was not one of them?

19 A. I don't think that was the best option.

20 Q. Dr. Tracy didn't do any of the things you just described,
21 did he?

22 A. No.

23 Q. We talked earlier about the university regulations, we
24 compared his to Ms. Copeland's.

25 Those university regulations apply to tenured faculty,

1 correct?

2 A. Correct.

3 Q. Do you recall generally which sections you reviewed for Dr.
4 Tracy when you prepared this Notice of Proposed Discipline
5 Termination?

6 A. It says here I referred to B, V, OO and Article 19 of the
7 collective bargaining unit.

8 Q. Do you know what the sections provide?

9 A. One has to do with insubordination, one has to do with
10 not -- a violation of university regulations, a statute, and
11 one of them has to do with withholding information.

12 Q. And disciplinary decisions, those are made on a
13 case-by-case basis?

14 A. Yes.

15 Q. You consider all of the facts and circumstances you are
16 presented with before making a decision?

17 A. Yes.

18 Q. Did you believe at the time you issued this notice of
19 proposed termination that Dr. Tracey was in violation of every
20 one of those regulations you cited?

21 A. Yes.

22 Q. Did you believe termination was an appropriate next step?

23 A. Yes. I think he had been asked to do something for almost
24 two months, I can't imagine another business that would allow
25 an employee to continue to refuse a supervisor's directive.

1 Q. Dr. Alperin, I will ask you to flip to the very last page
2 of your Notice of Proposed Discipline Termination.

3 Did Dr. Tracy have the opportunity to respond to this
4 notice?

5 A. Yes.

6 Q. And he could have -- could he have provided additional
7 documentation -- could he have provided additional
8 documentation for your consideration prior to you issuing a
9 final notice of termination?

10 A. Yes.

11 Q. And did he?

12 A. No.

13 Q. At this time, Dr. Alperin, I kind of want to walk you a
14 little bit through the time line. I don't want to spend a lot
15 of time, you have been up here this morning and yesterday.

16 Dr. Alperin, what is your current position with the
17 university?

18 A. Senior adviser in academic affairs.

19 Q. How long have you been the senior adviser?

20 A. Since July 2016.

21 Q. I believe before that, Vice Provost and various times
22 associate professor?

23 A. Yes.

24 Q. Before going to work in the Provost's office you were a
25 faculty member?

1 A. Yes.

2 Q. Were you a department chair?

3 A. I was.

4 Q. What did you teach?

5 A. I taught social work.

6 Q. So, Dr. Alperin, as a former faculty member, department
7 chair, Vice Provost, are you familiar with the expectations of
8 faculty members?

9 A. Yes, I believe so.

10 Q. Let me take you all the way back, you testified yesterday
11 you learned about Dr. Tracy's blog when the university was
12 closed for the holidays; is that correct?

13 A. Correct.

14 Q. Were you reading his blog?

15 A. Once I -- at that time, December 2012, when we first
16 started getting comments, I did look at the blog to see what
17 people were talking about.

18 Q. Do you have a blog?

19 A. No.

20 Q. Do you regularly read blogs?

21 A. No.

22 Q. So, you were reading Dr. Tracy's blog only in reference to
23 the response you received from the public; is that correct?

24 A. Yes.

25 Q. After the holiday break, when you came back to the

1 university, had any of the attention surrounding Dr. Tracy
2 subsided?

3 A. No.

4 Q. It had gotten more intense, hadn't it?

5 A. Yes.

6 Q. If you had to estimate, how many emails do you think the
7 university received in 2013?

8 A. I don't know, I imagine it was thousands.

9 Q. Were you concerned that the public was reaching out to the
10 university about Dr. Tracy's comments and --

11 A. Yes.

12 Q. I am sorry -- and seemingly concluding that the university
13 was sponsoring those statements?

14 A. I worked at the university a long time, and it was
15 disturbing not only to the functioning, but to the reputation
16 of the university.

17 Q. Isn't that one of the reasons the collective bargaining
18 agreement requires a disclaimer when they are writing in their
19 capacity?

20 A. Yes.

21 Q. Did you consider whether Dr. Tracy was in compliance with
22 university regulations?

23 A. In terms of the disclaimer, yes, and the reported outside
24 activity.

25 Q. Why were you making that assessment?

1 A. I had people -- the president and people outside were
2 asking questions and we did due diligence to find out what
3 exactly was happening.

4 Q. So, you and Dr. Coltman met with Dr. Tracy in January 2013?

5 A. Yes.

6 Q. You mentioned you believed you had an obligation to see
7 what was happening from his side of things?

8 A. Yes, he was a faculty member.

9 Q. Were you concerned about Dr. Tracy's safety in 2013?

10 A. Yes.

11 Q. Why?

12 A. Some of the emails and phone calls were disturbing,
13 threatening, profanity, I didn't know what he might be
14 receiving individually. This is what we were receiving and we
15 were concerned about the safety of the family, students, his
16 safety, other people, the faculty. People at the campus were
17 concerned.

18 Q. Where were they coming from?

19 A. All over the world.

20 Q. Who were they directed to?

21 A. We directed them to Lisa Metcalf and the office of the
22 president. They were coming all over campus, I don't know how
23 people decided -- a lot of them were going to the College of
24 Arts and Letters, other people were getting them on campus as
25 well.

1 Q. Did other faculty members express their concern about their
2 safety and safety of the students?

3 A. Yes.

4 Q. Did you share all of these with Dr. Tracy?

5 A. A broad brush description of what was happening, yes.

6 Q. How did Dr. Tracy react?

7 A. I don't know. He didn't react as he was terribly
8 concerned, but that may be the way he responds.

9 Q. Was that surprising?

10 A. Yes.

11 Q. Why?

12 A. I thought it was -- I mean, for --

13 MR. BENZION: Objection, relevance.

14 THE COURT: Overruled.

15 THE WITNESS: It was very disturbing to read the
16 emails, and I would think that if I had received so many
17 emails, I would be upset and be concerned for myself and the
18 people around me.

19 BY MS. GRIFFIN:

20 Q. Did you discuss with Dr. Tracy the impact of the public
21 attention to his comments?

22 A. Yes.

23 Q. And what was the impact on the university, Dr. Alperin?

24 A. Well, the phone lines were clogged, emails were clogged,
25 but there were donors who withdrew donations, there were

1 students who withdrew from the university, there were people
2 who said they wouldn't apply to the university, there were
3 alumni who were upset and withdrawing. Those are the ones I
4 remember generally.

5 Q. Was that part of the reason why you were so concerned with
6 Dr. Tracy's disclaimer?

7 A. Yes.

8 Q. And during that meeting, did you also discuss with Dr.
9 Tracy his work for Global Research?

10 A. Yes.

11 Q. At that time, did you have reason to believe that Global
12 Research was part of Dr. Tracy's annual assignment?

13 A. I think there was confusion there, because he did talk to
14 his supervisor about Global Research, it was tied to what he
15 did as a faculty member.

16 Q. What difference does it make whether or not Global Research
17 was part of his annual assignment?

18 A. If it is part of the annual assignment, he doesn't have to
19 complete an outside activity form.

20 Q. So, if a particular research is part of the assignment or
21 inside work for the university, would he be required to submit
22 that for evaluation?

23 A. He could submit that as part of his annual evaluation, yes.

24 Q. And he would be required to meet the academic standards
25 common to his expertise?

1 A. Yes.

2 Q. If a particular research is not part of the assignment or
3 outside work for the university, it is not going to be
4 evaluated as part of his duties?

5 A. Correct.

6 Q. If that is the case and it's related to his profession,
7 then he is required to disclose it under the collective
8 bargaining agreement as a reportable activity?

9 A. Yes.

10 Q. Where does it say that in the collective bargaining
11 agreement, Dr. Alperin?

12 A. I believe it says that in Article 19.

13 MS. GRIFFIN: I handed the witness Defendant's Exhibit
14 1, which is in evidence. May I publish?

15 THE COURT: Yes.

16 BY MS. GRIFFIN:

17 Q. Dr. Alperin, let's go to Article 19. What constitutes a
18 reportable outside activity?

19 A. "Reportable outside activity shall mean any compensated or
20 uncompensated professional practice, consulting, teaching or
21 research which is not part of the employee's assigned duties
22 and for which the university has provided no compensation."

23 Q. And this is where we get this idea of things within the
24 annual assignment, things that are part of what the
25 university --

1 MR. BENZION: Objection, counsel is testifying.

2 THE COURT: Well, why don't you put your question to
3 the witness.

4 MS. GRIFFIN: Sure.

5 BY MS. GRIFFIN:

6 Q. Is this where you make your distinction why it matters what
7 is in the annual assignment, Dr. Alperin?

8 A. Yes.

9 Q. Did you share this obligation with Dr. Tracy during your
10 meeting in January 2013?

11 A. Yes.

12 Q. Dr. Alperin, does FAU support the academic freedom of
13 faculty members?

14 A. Yes.

15 Q. Academic freedom comes with responsibilities, doesn't it?

16 A. Yes.

17 Q. One of the responsibilities is to make it clear when
18 statements are personal opinions and not university positions,
19 correct?

20 A. Correct.

21 Q. Where is that in the CBA?

22 A. In this article as well as Article 5.

23 Q. Where is it in this article, since we are already here?

24 A. 19.7.

25 Q. And it refers back to Article 5.3(d)?

1 A. Correct.

2 Q. And generally, I believe you testified yesterday, although
3 the word disclaimer does not appear here, that is how the
4 university interprets it, correct?

5 A. Correct.

6 Q. So, if Professor Tracy's work for Global Research or his
7 blog was not part of the annual assignment, would he be
8 required to report a statement including his opinion versus the
9 university's position?

10 A. Yes.

11 Q. Did you tell Dr. Tracy to stop blogging in 2013?

12 A. No.

13 Q. You did tell him what the obligations required of him?

14 A. Correct.

15 Q. And did you ask him for evidence that showed the disclaimer
16 he was using at the time?

17 A. Yes.

18 Q. Why would you do that?

19 A. I wanted to make sure that he was on -- it was there, I
20 think we wanted to make sure it was there.

21 We needed to do our due diligence and report back to the
22 president that it was there.

23 Q. And you communicated both these requirements to include a
24 disclaimer and report to Dr. Tracy in this meeting of
25 January 2013?

1 A. Yes.

2 Q. Was that reiterated in writing?

3 A. Yes.

4 Q. When you left that meeting with Dr. Tracy in January 2013,
5 did you have the impression that he understood his obligations?

6 A. I thought so.

7 Q. Did you personally follow up on whether he submitted his
8 report of outside activities?

9 A. No.

10 Q. Why not?

11 A. As I said, there are almost 4,000 employees, that was the
12 responsibility below me, I don't police the faculty on that.

13 Q. And did you expect Dr. Tracy would comply with the
14 directive?

15 A. Yes.

16 Q. After this meeting, did Dr. Tracy make it clear to the
17 public that he was using -- that he was giving his own personal
18 opinions and they did not represent the opinions of the
19 university, in your opinion?

20 A. He added a disclaimer to one part of the blog, but it
21 wasn't on all the pages.

22 Q. And did his comments continue to be associated with the
23 university based on the reaction you received from the public?

24 A. Yes.

25 MR. BENZION: Objection, facts not in evidence.

1 *THE COURT:* Well, the question is, did his comments
2 continue to be associated with the university based on the
3 reaction you received from the public? The answer is yes. I
4 will allow that. If you want to redirect on that, you may.

5 *BY MS. GRIFFIN:*

6 Q. Dr. Alperin, at one point in 2013, did Professor Tracy send
7 you items he posted on his blog?

8 A. Yes.

9 Q. Did that article have a disclaimer on it?

10 A. No.

11 Q. Was that a problem?

12 A. Yes.

13 Q. And I think you indicated that he had a disclaimer on the
14 about page. Was that adequate?

15 A. We didn't believe so.

16 Q. So, what happened next?

17 A. I believe he received a notice from Dean Coltman about the
18 disclaimer.

19 Q. And did Dr. Tracy fix the issue right away?

20 A. No.

21 Q. He grieved --

22 A. Yes, he filed a grievance.

23 Q. How do you feel generally about faculty grievances?

24 A. That is fine, that is the due process we have built into
25 place.

1 Q. You weren't upset Dr. Tracy filed a grievance, were you?

2 A. No.

3 Q. And why, exactly, did the university enter a settlement
4 agreement with Dr. Tracy in 2013?

5 A. Again, our primary objective was to have his memoryhole
6 blog -- it wasn't supported by FAU -- distanced from FAU.

7 He had been offered a settlement agreement, I believe in
8 step one, but was not accepted, and we went to step two, and
9 that is why the settlement agreement finally was approached in
10 September of 2013.

11 Q. Dr. Alperin, I would like you to look back at Defendant's
12 19.

13 MS. GRIFFIN: Your Honor, I would like to publish.

14 THE COURT: Yes.

15 BY MS. GRIFFIN:

16 Q. Dr. Alperin, where does the settlement address Dr. Tracy's
17 obligation to report outside activities?

18 A. I think it is primarily about the disclaimer.

19 Q. So, the settlement didn't address the obligation to report,
20 did it?

21 A. I don't see that.

22 Q. And Dr. Alperin, where is an employee's personnel file?

23 A. Human Resources.

24 Q. Other departments keep files on faculty members, too?

25 A. Correct.

1 Q. You called yours the credential file?

2 A. Yes. The Human Resource file has all of the information
3 about benefits, and the credential file has transcripts and
4 appointment letters, used to have appointments, but that is all
5 online now. And then anything -- then, I might have a
6 grievance file which has to be separate from the credential
7 file, and then in the college, they may have other files, and
8 anything of value would be at the department of college level,
9 but that is -- evaluations are protected, and that is why I
10 don't have them in the credential file, and then there is a
11 tenure file.

12 Q. There are lots of files?

13 A. Yes.

14 Q. To your knowledge, does the March 2013 Notice of Discipline
15 appear in the Plaintiff's personnel file?

16 A. I believe it was in the grievance file. I don't believe it
17 was in the credential file.

18 Q. To your knowledge, is it in the personnel file in HR?

19 A. I don't know.

20 Q. There were some questions yesterday about the Notice of
21 Discipline appearing in a file pursuant to response to a public
22 records request.

23 Isn't it true that after Dr. Tracey was terminated in
24 January 2016, the university received a number of requests for
25 public records relating to Dr. Tracy?

1 A. I believe so, yes.

2 MR. BENZION: Objection, lack of personal knowledge
3 about this line of questioning.

4 MS. GRIFFIN: I would be happy to show them the
5 interrogatory she signed, your Honor.

6 THE COURT: Okay, if that is what counsel wants to
7 establish the foundation.

8 MS. GRIFFIN: I show the witness what is marked 95-A,
9 not in evidence.

10 THE COURT: Plaintiff's?

11 MS. GRIFFIN: Yes.

12 THE COURT: Yesterday we had 95-A and 95-B marked. Do
13 you want to mark 95-A now, Plaintiff's exhibits, is that what
14 you are referring to, 95-A? I have a note that 95-A, and B --

15 MR. BENZION: It is part of 95.

16 THE COURT: I will mark 95-A right now for ID only.

17 BY MS. GRIFFIN:

18 Q. I direct you to page five of 95-A.

19 Dr. Alperin, on behalf of the university, you provided a
20 response relating to public records requests that were produced
21 in -- or following Dr. Tracy's termination in 2016, correct?

22 A. Yes.

23 Q. Back to -- so, it is true after Dr. Tracey was terminated
24 in 2015, the university even received a number of requests for
25 records of Dr. Tracy?

1 A. Yes.

2 Q. And those records asked for a number of things over and
3 above the personnel file?

4 A. Correct.

5 Q. The university produced all publicly related records
6 relating to Dr. Tracy?

7 A. Yes.

8 Q. And these included records other than the personnel file,
9 correct?

10 A. Yes.

11 Q. So, it is possible the March 2013 Notice of Discipline does
12 not appear in Dr. Tracy's personnel file, but was included in
13 response to a public records request?

14 A. Correct.

15 MS. GRIFFIN: Your Honor, I think now would be an
16 appropriate time for a break, it is about 10:30, if that is
17 acceptable to the Court.

18 THE COURT: How much longer do you have with the
19 witness?

20 MS. GRIFFIN: I am about a third of the way through my
21 cross, my direct is very short. I will be under both
22 estimates.

23 THE COURT: Okay.

24 We can take our mid-morning break, ladies and
25 gentlemen. We will be in recess for 15 minutes. It is 10:30,

1 we will be in recess for 15 minutes, until 10:45, with the same
2 instructions to drink ginger tea, do not discuss the case, do
3 not review any media, do not talk about the case with anyone
4 else, do not have any contact with anyone associated with the
5 case.

6 (Thereupon, the jury leaves the courtroom.)

7 *THE COURT:* Okay, to get a sense of timing, totality
8 from Defense, if we get back at 10:45, when do you think you
9 will be done with your cross/direct?

10 *MS. GRIFFIN:* I am about halfway through, your Honor.

11 *THE COURT:* I am planning, I want to know totally how
12 much more time.

13 *MS. GRIFFIN:* Hour and a half, two hours.

14 *THE COURT:* Probably won't finish before lunch time.

15 *MS. GRIFFIN:* Maybe with cross, not cross and direct.

16 *THE COURT:* We'll shoot for ending five minutes before
17 12:00, keep that in mind if there is a natural breaking point
18 at or about twelve o'clock. We will take an hour and 15
19 minutes, and what you haven't finished you will finish then and
20 then redirect, cross, and then Dr. Coltman should be on the
21 stand by this afternoon.

22 *MR. CURLEY:* I asked Dr. Coltman to be here at 1:30.

23 *THE COURT:* As long as she is here, better to have her
24 lined up.

25 Okay, we will take our recess.

1 *(Thereupon, a short recess was taken.)*

2 *(Thereupon, the jury returns to the courtroom.)*

3 THE COURT: Welcome back, you may be seated.

4 The witness remains under oath on the stand. You may
5 continue.

6 BY MS. GRIFFIN:

7 Q. Dr. Alperin, I want to talk for a minute about the conflict
8 of interest, outside activities policy from the collective
9 bargaining agreement.

10 A. Okay.

11 Q. You have Defendant's Exhibit 1. Dr. Alperin, who signed
12 the 2009-2012 collective bargaining agreement on behalf of the
13 union?

14 MR. BENZION: Objection, cumulative.

15 THE COURT: Overruled.

16 THE WITNESS: I believe it was -- show me the page.
17 James Tracy.

18 BY MS. GRIFFIN:

19 Q. To your knowledge -- actually, Dr. Alperin, as part of your
20 duties and responsibilities when you were Vice Provost, were
21 you responsible for participating in the bargaining process?

22 A. Yes.

23 Q. So, to your knowledge, when Dr. Tracy signed the 2009-2012
24 collective bargaining agreement on behalf of the union, did he
25 raise any concerns about the definition of reportable outside

1 activity?

2 A. Not to my knowledge.

3 Q. And to your knowledge, Dr. Alperin, how long has the
4 university required faculty members to report outside
5 activities?

6 A. When I came to Florida Atlantic University in 1979, it was
7 required. I imagine it was required before that.

8 Q. Let's look at Article 19.

9 We addressed this earlier. What activities does the
10 collective bargaining agreement require faculty members to
11 report?

12 A. It says compensated or uncompensated professional practice,
13 consulting, teaching or research which is not part of the
14 employee's assigned duties.

15 Q. And the policy also defines conflict of interest, doesn't
16 it?

17 A. Yes.

18 Q. And puts it into three different categories, correct?

19 A. Yes.

20 Q. What is the second paragraph, potential conflict of
21 interest identified in the collective bargaining agreement?

22 A. Any activity which interferes with the full performance of
23 the employee's professional or institutional responsibilities
24 or obligations.

25 Q. Is this what you were referring to earlier when we talked

1 about the idea of a conflict of commitment?

2 A. Yes.

3 Q. Not all faculty members work from 9:00 to 5:00, do they?

4 A. Correct.

5 Q. Their schedules may fluctuate depending on their schedule?

6 A. Yes.

7 Q. But they are still required to work full-time hours as a
8 faculty member for the university, correct?

9 A. Correct.

10 Q. Is that why it is important for faculty to report even
11 uncompensated outside activities?

12 A. Yes.

13 Q. Because they operate without day-to-day supervision?

14 A. Correct.

15 Q. I think you mentioned earlier the university is funded
16 partially or by taxpayers' dollars?

17 A. Correct.

18 Q. The university has an obligation to make sure faculty
19 members are giving the university full performance of their
20 professional duties, correct?

21 A. Correct.

22 Q. How does the university decide if a conflict of interest
23 exists?

24 A. When the report of outside employment, professional
25 activity is completed, it is between the faculty member and

1 direct supervisor initially.

2 Q. And let's look at Section 19.3 here.

3 So, can you read Section 19.3 for the jury?

4 A. Yes. "Conflicts of interest prohibited. Conflicts of
5 interest are prohibited and employees are responsible for
6 resolving them by working with their supervisors and other
7 university officials."

8 Q. So, faculty members submit their report and have a
9 conversation to work with their supervisor, correct?

10 A. Yes.

11 Q. What information are faculty members required to provide
12 with their report of outside activity?

13 A. The form asks about activity, who may be involved in it,
14 how many hours on average a week it takes, other things that
15 are specific to the division of research that have to do with
16 intellectual property rights.

17 Q. And so, what happens if there is a potential conflict of
18 interest?

19 A. It either can -- the activity could be prohibited or it
20 could be managed.

21 Q. And in your experience, are most activities managed or most
22 potential conflicts of interests managed?

23 A. Yes.

24 Q. What if the faculty member doesn't agree with the
25 determination of their supervisor?

1 A. They can file an expedited grievance.

2 Q. Dr. Alperin, I am going to bring up Defendant's 142, which
3 is admitted into evidence.

4 MS. GRIFFIN: May I publish?

5 THE COURT: Yes.

6 BY MS. GRIFFIN:

7 Q. Dr. Alperin, if you could look at the screen, I don't have
8 a hard copy for you.

9 Is this the form that you and Dean Coltman told Dr. Tracy
10 to fill out in January 2013?

11 A. Yes.

12 Q. Let's look at nature of employment/activity right in the
13 middle there.

14 What options are available?

15 A. Employment or other professional activity, continuing
16 business interests including managerial interests or position,
17 other compensated activity.

18 Q. So, if the faculty member has outside employment, are they
19 required to report it on this form?

20 A. Yes.

21 Q. But this form also applies to uncompensated activities,
22 correct?

23 A. Yes.

24 Q. And the form requires them to provide the name, location,
25 dates of anticipated activity, number of hours per week for the

1 activity, correct?

2 A. Correct.

3 Q. And it requires them to provide a description of the
4 activity, correct?

5 A. Yes.

6 Q. Does all of this match up with what is required in the
7 collective bargaining agreement?

8 A. I believe so. I mean -- yes, I believe so. I would have
9 to look specifically, but I believe this is what we have, yes.

10 Q. Is there anywhere on the form that lists the content of
11 speech?

12 A. No.

13 Q. I think it does ask faculty members not just the hours per
14 week of this activity, but the total hours per week they spend
15 on all activities?

16 A. Correct.

17 Q. Why do you need to know how many hours a week the faculty
18 member spends on all activities?

19 A. Because we are making a determination whether there is a
20 conflict or not. It is not just one activity, there may be
21 other activities that come into play.

22 Q. And that comes back to the conflict commitment?

23 A. Yes.

24 Q. Are the faculty members required to report use of resources
25 on the form?

1 A. Yes.

2 Q. Are faculty members required to sign this form?

3 A. Yes.

4 Q. It looks like there is a certain file indication box there.
5 Do you see that box?

6 A. Yes.

7 Q. What does the faculty member's signature represent?

8 A. He is certifying that the employment or professional
9 activity does not constitute a conflict of interest under
10 Chapter 112 of the Florida statutes and will not interfere with
11 their assigned duties and responsibilities at Florida Atlantic
12 University, and they agree to notify the university immediately
13 if the nature of the activity described in the report changes.

14 Q. Faculty members are required to report outside activities
15 even if they don't believe there is a conflict of interest,
16 correct?

17 A. Correct.

18 Q. And the faculty member's supervisor also has to approve
19 there is no conflict of interest, correct?

20 A. Correct.

21 Q. Can a faculty member use university resources for outside
22 activities?

23 A. That could be allowed.

24 Q. Do they have to report that use?

25 A. Yes, it has to be approved.

1 Q. Why are faculty members prohibited from using university
2 resources for outside activities before getting prior approval?

3 A. Again, we are a state institution, the equipment is for the
4 function of the state. If there is a need to use it and the
5 chair and the dean don't see it as an interference, then it
6 could be used, but it needs to be reported and managed.

7 Q. And did Dr. Tracy tell you in 2013, whether he was using
8 university resources for outside activities?

9 A. I believe he indicated he was not at that time.

10 MR. BENZION: Objection, move to strike, lack of
11 personal knowledge testimony.

12 THE COURT: I believe it has already been testified
13 to, actually. It may have come up in your questioning, I don't
14 recall. That is already in. I am going to overrule.

15 BY MS. GRIFFIN:

16 Q. Dr. Alperin, has the conflict of activity policy ever been
17 audited?

18 A. Yes.

19 Q. When?

20 A. The report on the audit was issued in 2014, and it was an
21 audit of outside employment/professional activity, I believe
22 for the year 2012-2013.

23 Q. What was the outcome of that audit?

24 A. I believe the outcome was the Inspector General felt we had
25 many practices, policies, regulations in place to inform the

1 faculty of the need to complete reported outside employment,
2 professional activity, and there were some instances of
3 non-reporting.

4 Q. For those instances of non-reporting, Dr. Alperin, did any
5 of those faculty members refuse to submit a form?

6 A. No.

7 Q. Were those professors that did not initially submit a
8 report, but then submitted a report upon request disciplined?

9 A. I don't believe so.

10 MR. BENZION: Objection, move to strike, lack of
11 personal knowledge.

12 THE COURT: Overruled.

13 BY MS. GRIFFIN:

14 Q. And if they continue to or had refused to submit a report
15 when directed to do so, would the university have considered
16 discipline?

17 A. Yes.

18 Q. Dr. Alperin, have you ever submitted a report of outside
19 activities?

20 A. Yes.

21 Q. For what?

22 A. I currently have two that I have submitted. I am on the
23 board of Family Promise of South Palm Beach County, which is an
24 organization that believes every child deserves homes for
25 homeless families. In Delray Beach, I am on the Delray Beach

1 Homeless Task Force. In years past when I was a faculty member
2 in social work I provided supervision for people who were
3 interested in clinical licensure who worked for --

4 *MR. BENZION:* Objection, nonresponsive.

5 *THE COURT:* She is answering the question whether she
6 submitted an outside activity form and for what, so overruled.

7 *THE WITNESS:* I provided supervision, both compensated
8 and uncompensated, for social work.

9 *BY MS. GRIFFIN:*

10 *Q.* And you reported those as a faculty member?

11 *A.* Yes.

12 *Q.* Why did you submit the form for the work with the homeless
13 task force?

14 *A.* It is an activity that I am currently doing and I believe
15 it ties to my profession of social work.

16 *Q.* Dr. Alperin, are there any resources available to faculty
17 members if they have questions about the outside activity
18 policy?

19 *A.* Yes. There are a number of documents that are available.

20 *Q.* How often are faculty members required to report their
21 outside activities?

22 *A.* Human Resources sends an email to faculty -- to employees
23 annually reminding them to report. They are to report whenever
24 they begin an activity.

25 *Q.* Are there any other reminders given to faculty members to

1 report?

2 A. This is something that is part of orientation when they
3 come to the institution.

4 They currently sign something on boarding, they used to
5 sign a form, now they sign it on boarding. It is in the
6 collective bargaining agreement and it is now part of the
7 assignment faculty FAIR, Faculty Academic Information
8 Reporting.

9 Q. You gave us the full long name for FAIR. In a nutshell,
10 can you describe for the faculty what that process requires?

11 A. FAIR.

12 Q. Yes.

13 A. Yes. The chairperson completes the assignment in FAIR,
14 which I explained has to do with teaching, instruction,
15 research that they are planning to do, any service they might
16 do at the department of college university profession, and any
17 other assignment, and that goes from the supervisor to the
18 faculty member electronically and they are supposed to accept
19 it electronically.

20 Q. How long have faculty members been accepting assignments in
21 FAIR, if you know?

22 A. I think we started electronic FAIR around 2003.

23 Q. And how is -- or what is the reminder given to faculty
24 members when they engage in the FAIR system?

25 A. I believe they get an email, but clearly, they are --

1 either their supervisor or assistant in the department gives
2 them a reminder to go into FAIR and accept the assignment.

3 Q. I think you mentioned one of the reminders they get is in
4 FAIR?

5 A. Yes. For outside activity?

6 Q. Yes.

7 A. Yes, at the end of FAIR, when they accept their assignment
8 the affirmation box appears.

9 Q. Dr. Alperin, why do you have so many reminders to faculty
10 members to submit their report of outside activity forms?

11 A. We are interested in complying. We have an issue with some
12 engineering faculty, and we felt that we needed to put as much
13 in place as we could to make sure that people understood and
14 were complying.

15 Q. I think you just alluded to an issue with engineering?

16 A. Yes.

17 Q. Yesterday you were shown a document by Plaintiff's counsel
18 and were asked some questions about Dr. Agarwal?

19 A. Yes.

20 Q. Is that the same issue?

21 A. Yes, the issue of a faculty who submitted grants and didn't
22 indicate outside activity was brought to us by Dr. Newcomer,
23 interim vice-president for research, and that is what I was
24 shown yesterday.

25 Q. Did Dr. Agarwal ever refuse to submit an outside activities

1 report after being directed to submit one?

2 A. No.

3 Q. Dr. Alperin, yesterday counsel for Dr. Tracy asked you
4 about the additional explanation that came out in 2016. Do you
5 recall?

6 A. Yes.

7 Q. The university had guidelines on conflict of interest,
8 conflict of commitment and outside activities, including
9 conflict of interest in 2015, didn't it?

10 A. Correct.

11 Q. Was that document available to Dr. Tracy?

12 A. Yes.

13 Q. Do you know whether he was aware of that document?

14 A. Yes, I believe he refers to it in some of his
15 correspondence.

16 MS. GRIFFIN: Your Honor, I would like to introduce
17 Defendant's 79. This is already in evidence as Plaintiff's 13.

18 THE COURT: Any objection?

19 MR. BENZION: No objection, your Honor.

20 THE COURT: Okay. Defense 79 admitted without
21 objection.

22 (Whereupon Defense Exhibit 79 was marked for evidence.)

23 MS. GRIFFIN: May I publish?

24 THE COURT: Yes.

25

1 BY MS. GRIFFIN:

2 Q. Dr. Alperin, is this the document you mentioned that you
3 stated Dr. Tracy referred to in some of his writings?

4 A. Yes.

5 Q. Please turn to the top of page five.

6 A. Yes.

7 Q. This guidance specifically addresses uncompensated
8 activities, doesn't it?

9 A. Yes.

10 Q. How?

11 A. It states that a conflict may arise when an employee does
12 not receive a benefit, and gives an example.

13 Q. Okay. The document also provides a list of ways that
14 outside activities could pose a potential conflict of interest,
15 doesn't it?

16 A. Yes.

17 Q. What are some of the ways that it includes?

18 A. Um-m-m, it mentions educational -- it says the educational
19 programs and professional careers of individual students and
20 faculty members cannot be adversely affected by a faculty or
21 staff member's outside activities or financial interests.

22 The university's research and education programs cannot be
23 adversely affected and must remain credible. The outside
24 activities of employees should not impede the dissemination of
25 knowledge.

1 The university's personnel and resources must be used for
2 the promotion of the mission of the university and the public
3 interest rather than for private gain.

4 Q. And Dr. Alperin, further down on the same page, it gives
5 examples of activities that may pose a potential conflict,
6 correct?

7 A. Correct.

8 Q. And the first one there talks about time commitments,
9 doesn't it?

10 A. Yes.

11 Q. And the second addresses the use of university equipment,
12 correct?

13 A. Yes.

14 Q. And these are items that would be required to be reported
15 as outside activities, correct?

16 A. Yes.

17 Q. Did the additional explanation we talked about yesterday
18 replace this document?

19 A. No.

20 Q. But it contains a lot of the same information, doesn't it?

21 A. Yes.

22 Q. So, why was the additional explanation necessary?

23 A. The changes that the additional information had in that
24 document and in the form had to do with the impetus from the
25 division of research because of changes in Federal regulations

1 in terms of grants.

2 Q. Okay. Dr. Alperin, what does the division of research
3 oversee?

4 A. The division of research overseas all the research that is
5 done at the university.

6 Q. Including things like Federal grants, correct?

7 A. Correct.

8 Q. So, the additional explanation was updated to add new
9 requirements in regulations relating to those types of
10 sponsored programs, correct?

11 A. Correct. There was -- the Federal Government was
12 concerned -- the federal agencies used to have a cap of \$10,000
13 as significant financial interest and they changed it to
14 \$5,000. They also wanted to know about relative obligations in
15 terms of outside activities and one piece added by the current
16 president of research asks that the faculty spend no more than
17 eight hours a week in outside activity, and that is new.

18 Q. Significant financial interests, that has to do
19 specifically with grants, correct?

20 A. Correct.

21 Q. Did Dr. Tracy have any grants under the division of
22 research?

23 A. Not that I know of.

24 Q. Would any of the changes and the additional explanation
25 made after Dr. Tracy's termination impact his obligations to

1 report?

2 A. No.

3 Q. Dr. Alperin, I am going to hand you Defendant's 81 in
4 evidence.

5 MS. GRIFFIN: May I publish?

6 THE COURT: Yes.

7 BY MS. GRIFFIN:

8 Q. We talked about an audit report coming out in 2014, grant
9 requirements and issues specific to the division of research,
10 correct?

11 A. Correct.

12 Q. Did that renew the focus of the university on the outside
13 activities policy?

14 A. Yes.

15 Q. I believe you indicated earlier that as part of the FAIR
16 system faculty have to accept the annual assignment, there is a
17 box they have to check?

18 A. Yes.

19 Q. Is this that box?

20 A. Yes.

21 Q. What is the acknowledgment of faculty agreeing to?

22 A. They are required to report any outside activity,
23 compensated or uncompensated, and any financial interest on any
24 professional activities as required in FAU regulations and
25 policies.

1 Q. And it provides a link to the guidelines we just discussed,
2 correct?

3 A. Correct.

4 Q. And a link to the form, report of outside employment or
5 professional activity form, correct?

6 A. Correct.

7 Q. And all the faculty member has to do is click "okay"?

8 A. Yes.

9 Q. When was this acknowledgment added?

10 A. 2014.

11 Q. Did the decision to add this acknowledgment have anything
12 to do with Dr. Tracy?

13 A. No.

14 Q. And are all faculty members required to electronically
15 accept their annual assignment?

16 A. Yes.

17 Q. Has every faculty member since 2014 electronically accepted
18 their annual assignment after clicking okay on this
19 acknowledgment?

20 A. Yes.

21 Q. Dr. Tracy?

22 A. In 2014, I believe he did.

23 MR. BENZION: Objection, move to strike, lack of
24 personal knowledge.

25 THE COURT: Overruled.

1 BY MS. GRIFFIN:

2 Q. Dr. Alperin, did there come a time when Dr. Tracy would not
3 electronically accept his annual assignment and click this
4 okay?

5 A. I believe in October of 2015.

6 Q. Was that an issue?

7 A. Yes.

8 Q. Why?

9 A. There was another audit having to do with FAIR and we were
10 monitoring that faculty acceptance of their assignment in FAIR,
11 and the only way he could, my understanding, accept his
12 assignment in FAIR is by clicking okay here.

13 Q. So, the university was trying to ensure that all faculty
14 members electronically accepted their annual assignment,
15 correct?

16 A. Yes.

17 Q. And did you have a deadline instituted to do that by?

18 A. I believe we did. We -- faculty are required to get their
19 assignment, according to the collective bargaining agreement,
20 six weeks before the semester.

21 Q. How did you first learn about Dr. Tracy's refusal to check
22 the box?

23 A. I believe it was an email.

24 Q. And did you provide Dr. Williams an explanation about the
25 box?

1 A. I talked to Dean Coltman.

2 Q. And did you also respond to Dr. Williams with an
3 explanation that the box had been added in 2014, as a result of
4 this grant issue?

5 A. Yes.

6 Q. Did Dr. Tracy check the box after getting an explanation of
7 the box?

8 A. I don't believe so.

9 Q. But he eventually submitted a hand signed copy of his
10 assignment, correct?

11 A. Yes.

12 Q. Does that comply with your requirements?

13 A. No.

14 Q. Why not?

15 A. We need an electronic file that needs to be submitted to
16 Tallahassee.

17 Q. So, you know that Dr. Williams asked him to electronically
18 acknowledge, and you said you spoke with Dr. Coltman, so both
19 of them had asked him to acknowledge the box?

20 A. I believe so.

21 Q. And he still refused, correct?

22 A. Yes.

23 Q. Did you ever investigate whether Dr. Tracy had checked the
24 box in the past?

25 A. Yes.

1 Q. What did you do?

2 A. I contacted Jason Ball, who is the associate professor and
3 chief information officer, and asked if Dr. Tracy had checked
4 the box before, because I knew the box had been there, and I
5 was surprised that --

6 MR. BENZION: Objection, objection, this is seeking to
7 elicit a hearsay response.

8 MS. GRIFFIN: She just described him as the
9 vice-president of information technology.

10 MR. BENZION: This is not offered to this party, this
11 is offered by this party.

12 THE COURT: That is true.

13 BY MS. GRIFFIN:

14 Q. Did you personally confirm Dr. Tracy checked the box?

15 A. Yes.

16 Q. Had he checked it earlier in 2015?

17 A. Yes, I believe July 2015.

18 Q. Did you find it strange that Dr. Tracey was now refusing to
19 check the box?

20 A. Yes.

21 Q. What did you think was going on?

22 A. I wasn't sure.

23 Q. Dr. Alperin, you reviewed the emails between Dr. Tracy and
24 Dr. Williams, correct?

25 A. Yes.

1 *MS. GRIFFIN:* Your Honor, I would like to admit
2 Defendant's 23. It is already admitted as Plaintiff's 31.

3 *THE COURT:* Any objection?

4 *MR. BENZION:* No objection.

5 *THE COURT:* Defendant's 23 admitted without objection.
6 (Whereupon Defense Exhibit 23 was marked for evidence.)

7 *MS. GRIFFIN:* May I publish?

8 *THE COURT:* Yes.

9 *BY MS. GRIFFIN:*

10 *Q.* So, Dr. Alperin, is this one of the emails you reviewed
11 between Dr. Williams and Dr. Tracy?

12 *A.* Yes.

13 *Q.* Let's look down at that -- it looks like the fourth full
14 paragraph, it begins "in light of the above."

15 What did Dr. Tracy ask for from Dr. Williams?

16 *A.* He was asking for a signed statement asserting that his
17 personal activities, media criticism, alternative journalism,
18 blogging, in no way constitute legitimate intellectual creative
19 endeavors and cannot be a conflict of interest, conflict of
20 commitment or outside activities as defined in the
21 administration's policy addressing such concerns.

22 *Q.* Dr. Alperin, to your knowledge, did Dr. Tracy's academic
23 work for the university include areas such as media criticism
24 and alternative journalism?

25 *A.* Yes.

1 Q. So, would these activities have been reportable outside
2 activities?

3 A. Yes.

4 Q. So, in essence, isn't Dr. Tracy asking for exactly what the
5 form would provide him?

6 A. Yes.

7 Q. Let's go back up, before we leave this email, to the second
8 paragraph.

9 Dr. Tracy references the administration's policy as
10 evidenced on the form Florida Atlantic University guidelines on
11 conflict of interest, conflict commitment and outside
12 activities, including financial interests.

13 Is that the same document we reviewed earlier?

14 A. Yes.

15 Q. And Dr. Alperin, could you read the last sentence in that
16 paragraph beginning "These are indeed"?

17 A. "These are indeed layers of things that in my view are
18 entirely unmistakable and straightforward."

19 Q. Did you believe that Dr. Tracy knew where to go if he was
20 confused as he claimed to be?

21 A. Yes.

22 Q. And in this chain of emails, did you perceive any of Dr.
23 Williams' emails to Dr. Tracy to limit the conflict of
24 interest, outside activities policy to just outside employment?

25 A. No.

1 *MS. GRIFFIN:* Exhibit 26, Defendant's Exhibit 26.

2 Your Honor, this is already in evidence, may I publish?

3 *THE COURT:* Yes.

4 *BY MS. GRIFFIN:*

5 *Q.* Dr. Alperin, I want to go through the time line quickly, I
6 want to get your perspective.

7 I handed you Defendant's Exhibit 26, and I will ask you to
8 turn to Attachment C. It is on the board as well if that is
9 helpful to you.

10 *A.* Okay.

11 *Q.* Let's go to the second page.

12 Dr. Williams sent the entire department a reminder they
13 needed to submit the outside employment and activity forms on
14 October 20, 2015, correct?

15 *A.* Correct.

16 *Q.* It is a little out of order, but let's go to the fourth
17 page. Starting at the very bottom, who is Alexandra
18 Schoenmakers?

19 *A.* I believe she was the program assistant in the School of
20 Communication and Multimedia Studies.

21 *Q.* So, the program assistant in the School of Communications
22 and Multimedia Studies, let's go to the next page, sent Dr.
23 Tracy a reminder to submit his annual assignment on October 26,
24 2015, correct?

25 *A.* Yes.

1 Q. Let's go back to the email right above that one.

2 It looks like -- the page before that, and here we have
3 another email from Dr. Williams, correct?

4 A. Correct.

5 Q. October 27, 2015, telling Dr. Tracy to submit his annual
6 assignments and required forms, correct?

7 A. Yes.

8 Q. If we go back to the first page of Attachment C, Dr.
9 Williams tells Dr. Tracy -- this is where he passes along the
10 response regarding the FAIR system, correct?

11 A. Correct.

12 Q. And where the box is checked, correct?

13 A. Correct.

14 Q. And that was added in 2014, and in fact was not new,
15 correct?

16 A. Correct.

17 Q. And he tells him here, November 2, 2015, that he is not
18 optimistic that the hand signed copy of the annual assignment
19 will be accepted, correct?

20 A. Correct.

21 Q. And that he hopes Dr. Tracy will reconsider and sign the
22 assignment in FAIR, correct?

23 A. Correct.

24 Q. So, in the span of a couple of weeks, Dr. Tracey was told
25 at least four different times that he needed to electronically

1 submit his annual assignment and submit the report of outside
2 employment or professional activity forms, correct?

3 A. Yes.

4 Q. Did he?

5 A. No.

6 Q. Dr. Alperin, yesterday counsel asked you a number of
7 questions about whether Dr. Tracy ever said that he was
8 refusing to comply and you testified that his actions could be
9 considered a refusal, correct?

10 A. Yes.

11 Q. Can faculty members choose which policies they comply with?

12 A. No.

13 Q. Can tenured faculty members refuse the directives of their
14 supervisors to comply with the CBA?

15 A. No.

16 Q. So, when Dr. Tracy submitted a hand signed copy of his
17 assignment instead of checking the box like he was directed to
18 do at least four times, did you consider that to be a refusal?

19 A. Yes.

20 Q. And similarly, later, when Dr. Tracy didn't report his
21 memoryhole blog after being told to submit complete forms of
22 his outside activities, that was a refusal to comply with that
23 directive, wasn't it?

24 A. Yes.

25 Q. So, did Dr. Tracy's repeated refusal to electronically

1 submit his annual assignment and submit the report of outside
2 employment or outside activity forms lead to discipline?

3 A. Yes.

4 MS. GRIFFIN: Your Honor, I would like to admit
5 Defendant's 25, it is in as Plaintiff's Exhibit 35.

6 THE COURT: Any objection?

7 MR. BENZION: No objection.

8 THE COURT: Okay, admitted without objection.

9 (Whereupon Defense Exhibit 25 was marked for evidence.)

10 MS. GRIFFIN: May I publish?

11 THE COURT: Yes.

12 BY MS. GRIFFIN:

13 Q. Dr. Alperin, who sent Dr. Tracy this Notice of Discipline?

14 A. Dean Coltman.

15 Q. And did she discuss that decision with you first?

16 A. Yes.

17 Q. Did you agree with Dean Coltman that discipline was
18 appropriate?

19 A. Yes.

20 Q. Why?

21 A. I believe there had been -- going back and forth for about
22 a month at this point, and we needed to move forward.

23 Q. Did the notice require Dr. Tracy to take any action?

24 A. Yes.

25 Q. What did it require?

1 A. It asked him to acknowledge receipt of his 2015 annual
2 assignment through the FAIR system with all conditions, and
3 submit outside employment activity forms for 2013-14, 2014 one
4 five and 2015-16.

5 Q. Did it give him a deadline?

6 A. It gave him 48 hours.

7 Q. And does this Notice of Discipline tell Dr. Tracy that he
8 would be subject to additional disciplinary action if he
9 doesn't comply?

10 A. Yes.

11 Q. Did you expect Dr. Tracy to comply with Dr. Coltman's
12 directives in the Notice of Discipline?

13 A. Yes.

14 Q. Dr. Tracy ultimately checked the box and submitted his
15 annual assignment after this Notice of Discipline, didn't he?

16 A. Yes.

17 Q. But he still refused to submit the report of outside
18 activities?

19 A. Yes.

20 Q. Did you find that strange?

21 A. Yes.

22 Q. Why?

23 A. We had not prohibited him from any of his activities for
24 all these years. I don't know why he felt that if he submitted
25 these forms we would not approve them.

1 Q. Did Dr. Tracy respond to the Notice of Discipline?

2 A. Yes, I believe so.

3 Q. I believe that that is the letter I provided for you,
4 November 22nd?

5 A. Yes.

6 Q. That is Defendant's Exhibit 26, correct?

7 A. Yes.

8 Q. Did you review this letter after you received it?

9 A. Yes.

10 Q. And did you believe that Dr. Tracy understood the conflict
11 of interest/outside activities policy?

12 A. Yes.

13 Q. Why?

14 A. He -- in his responses, he references many documents
15 related to that. I believe he did understand.

16 Q. Can we pull up the letter.

17 Dr. Alperin, do you see here in the second paragraph on the
18 first page Dr. Tracy references again the guidelines document,
19 correct?

20 A. Yes.

21 Q. And that is the same document we reviewed earlier?

22 A. Yes.

23 Q. Let's look at page two, the third line from the top. Dr.
24 Williams has repeatedly maintained in email communications that
25 the conflict of interest document only applies to employees who

1 receive remuneration for such outside activities.

2 Did you agree with that characterization of Dr. Williams'
3 emails?

4 A. No.

5 Q. And Dr. Tracy uses the word remuneration here, too,
6 correct?

7 A. Correct.

8 Q. That is the same word for money Dr. Tracy used to describe
9 the thousand of dollars of compensation he received from his
10 blog the other day, isn't it?

11 A. Yes.

12 MR. BENZION: Objection, mischaracterization.

13 THE COURT: Can you restate the question.

14 BY MS. GRIFFIN:

15 Q. Have you heard Dr. Tracy use that word to refer to money he
16 received in connection with his blog?

17 A. Yes.

18 Q. Dr. Alperin, I am going to show you Defendant's 22, it is
19 in evidence.

20 MS. GRIFFIN: Your Honor, may I publish?

21 THE COURT: Yes.

22 BY MS. GRIFFIN:

23 Q. The paragraph starts with perhaps. Dr. Tracy says, "I was
24 recently asked to regularly contribute pieces to a major
25 Russian and news outlet's opinion section for which I would be

1 paid. Since money would be passing hands this surely would
2 make filing such a form appropriate."

3 Do you agree with that statement, Dr. Alperin?

4 A. Yes.

5 Q. I am going to show you Defendant's 21, in evidence.

6 MS. GRIFFIN: Your Honor, may I publish?

7 THE COURT: Yes.

8 BY MS. GRIFFIN:

9 Q. Dr. Alperin, turning to the second page, halfway down, do
10 you see that button that says donate?

11 A. Yes.

12 Q. Memoryhole Research Fund, correct?

13 A. Correct.

14 Q. Should Dr. Tracy have reported his memoryhole blog?

15 A. Yes.

16 Q. Let's turn back to Dr. Tracy's letter, Exhibit 26. Let's
17 go to the second page.

18 In that second paragraph there Dr. Tracy is providing his
19 explanation of the requirement to report, isn't he?

20 A. Yes.

21 Q. "Still, as I explained to Dr. Williams via email, his
22 explanation of the form report of outside employment or
23 professional activity is confusing and likely misleading
24 because said form distinguishes between such undertakings as
25 employment and professional activity. Further, Article 19.2 of

1 the collective bargaining agreement states reportable outside
2 activity shall mean any compensated or uncompensated
3 professional practice, consulting, teaching or research, which
4 is not part of the employee's assigned duties and for which the
5 university has provided no compensation."

6 Was Dr. Tracy explaining the policy to Dr. Williams?

7 A. Yes.

8 *MR. BENZION:* Objection, mischaracterization, quoting.

9 *THE COURT:* Well, this is from a document that is a
10 letter from Tracy to Williams?

11 *MS. GRIFFIN:* Dr. Tracy's letter to Dr. Coltman
12 explaining what he told Dr. Williams.

13 *THE COURT:* What is the objection?

14 *MR. BENZION:* Mischaracterization.

15 *THE COURT:* Overruled. The document is in evidence,
16 the jurors will be able to review it.

17 *BY MS. GRIFFIN:*

18 Q. Dr. Alperin, is this part of why you thought Dr. Tracy
19 understood his obligations?

20 A. Yes.

21 Q. Let's look at page three, the second to the last paragraph.

22 Dr. Tracy says that by submitting the report of outside
23 activity "I would likewise breach this settlement agreement."

24 Do you see that, Dr. Alperin?

25 A. Yes.

1 Q. Dr. Alperin, was there anything in the settlement agreement
2 that prohibited Dr. Tracy from reporting his outside
3 activities?

4 A. No.

5 Q. Did the settlement agreement address the obligation to
6 report in any way?

7 A. No.

8 Q. And did it relieve Dr. Tracy of his obligation to report?

9 A. No.

10 Q. Did you believe Dr. Tracy actually thought he would breach
11 the settlement agreement by reporting his outside activities?

12 A. I didn't understand that logic.

13 Q. Let's turn to page four of Dr. Tracy's letter.

14 Do you see where Dr. Tracy states, "If the FAU
15 administration seeks to discourage this research trajectory,
16 why is it also acknowledging the legitimacy of such work in my
17 annual assignments and publicly affirming it on its website?"

18 Did the university ever seek to discourage Dr. Tracy's
19 research trajectory?

20 A. No.

21 Q. In fact, Dr. Tracy taught a course called Cultural
22 Conspiracy?

23 A. Yes.

24 Q. Both before the Sandy Hook massacre and in 2014, correct?

25 A. Correct.

1 Q. Dr. Alperin, in this letter, or at any point in time, did
2 Dr. Tracy ever ask what box to check to report his memoryhole
3 blog?

4 A. No.

5 Q. Did he ever ask what constitutes a compensated activity or
6 whether the donations he received from his blog qualified as
7 compensated activity?

8 A. No.

9 Q. Did he ever ask whether he needed to report his
10 contribution to the book, nobody died at Sandy hook?

11 A. No.

12 Q. Did he ever ask whether he should report his blog even
13 though it isn't his employer?

14 A. Correct.

15 Q. Did he ask how to define the term "professional"?

16 A. No.

17 Q. Dr. Alperin, what is research?

18 A. Research is a structured investigation. Somebody gathers
19 facts, makes an assessment, and does a report.

20 Q. Does it matter what medium that research is published on?

21 A. No.

22 Q. Did Dr. Tracy ever ask you for a definition of research?

23 A. No.

24 Q. Did he ask any question at all about how to fill out the
25 report of outside employment or professional activity form?

1 A. Not that I know of.

2 Q. I believe you know -- does Dr. Tracy have a Master's Degree
3 and Ph.D.?

4 A. Yes.

5 Q. He was a former president of the union, right?

6 A. Correct.

7 Q. Dr. Alperin, did you believe that Dr. Tracey was confused
8 by the policy?

9 A. No.

10 Q. Did you discuss with Dr. Coltman the next steps after
11 reviewing this November 22nd letter?

12 A. Yes.

13 Q. And what did you discuss?

14 A. We discussed, I believe, at this point giving him another
15 opportunity to respond.

16 Q. Did you discuss the possibility of termination if he
17 didn't?

18 A. Probably at this point, yes.

19 Q. And did you ask Dr. Coltman to begin preparing a notice of
20 termination in the event he did not comply?

21 A. Yes.

22 Q. Is it uncommon for you to ask the dean to begin a first
23 draft of notice of termination?

24 A. No. It is a first draft.

25 Q. But did you want to terminate Dr. Tracy over his refusals

1 to report his forms?

2 A. No. But it is a serious decision and we needed the time to
3 make sure if we were going to do it, the letter was
4 appropriate.

5 Q. But you needed him to comply, correct?

6 A. Yes.

7 Q. So, you said you decided -- that you and Dr. Coltman
8 decided to offer him another chance, correct?

9 A. Yes.

10 Q. So, at some point between the receipt of this letter and
11 December 10, 2015, you and Dr. Coltman discussed the
12 possibility of termination, correct?

13 A. Yes.

14 Q. I believe you already have -- do you have Defendant's
15 Exhibit 49 over there?

16 MS. GRIFFIN: May we publish?

17 THE COURT: Yes.

18 BY MS. GRIFFIN:

19 Q. Is this the last chance that Dean Coltman offered Dr.
20 Tracy?

21 A. Yes.

22 Q. Does the email clarify whether Dr. Tracy has an obligation
23 to report?

24 A. Yes.

25 Q. And that extends his deadline, correct?

1 A. Correct.

2 Q. So, the forms were due the beginning of the academic year,
3 right?

4 A. Yes.

5 Q. And they were due again when Dr. Williams told Dr. Tracy to
6 submit the forms on the four occasions in October, correct?

7 A. Correct.

8 Q. And then Dr. Tracey was given another deadline in the
9 Notice of Discipline, correct?

10 A. Correct.

11 Q. And he still hadn't complied?

12 A. Correct.

13 Q. So, now this is the third and final extended deadline for
14 Dr. Tracy to submit his forms?

15 A. Correct.

16 Q. What is the deadline provided by Dr. Coltman?

17 A. Monday, December 14, 2015, at 5:00 p.m.

18 Q. And did Dr. Tracy meet that deadline?

19 A. No.

20 Q. Had Dr. Tracy been responding to his emails while on
21 paternity leave?

22 A. I believe so.

23 MR. BENZION: Objection, calls for speculation, lack
24 of personal knowledge.

25 THE COURT: If the witness has personal knowledge, she

1 can answer the question. If not, you shouldn't guess or
2 speculate.

3 *BY MS. GRIFFIN:*

4 Q. Dr. Alperin, you have seen communications between Dr. Tracy
5 and Dr. Williams while he was on paternity leave, correct?

6 A. Yes, I have.

7 Q. Did you have any reason to suspect he wouldn't receive an
8 email from Dr. Coltman?

9 A. No.

10 Q. When Dr. Tracy didn't respond by the deadline of
11 December 14, what did you do?

12 A. I am not sure. I believe that we probably would be moving
13 towards finalizing the letter of Notice of Discipline.

14 Q. And Dr. Tracy responded to Dr. Coltman late, correct?

15 A. Correct.

16 Q. But he missed the deadline?

17 A. Correct.

18 Q. And that was not the only problem with his submission, was
19 it?

20 A. Correct, it wasn't complete.

21 Q. Let's turn to Dr. Tracy's submissions, Defendant's Exhibit
22 24. I believe it is in evidence.

23 *MS. GRIFFIN:* May I publish?

24 *THE COURT:* Yes.

25

1 BY MS. GRIFFIN:

2 Q. First, Dr. Alperin, what does Dr. Tracy call the forms in
3 that first email on the top page?

4 A. He called them outside activity forms.

5 Q. Let's flip to his first report.

6 What does Dr. Tracy identify as the name of
7 employer/activity?

8 A. Global Research.

9 Q. And what does he identify as the description of that
10 activity?

11 A. Articles on media criticism/analyses.

12 Q. Does this report identify the content of his articles?

13 A. No.

14 Q. And as we discussed earlier, it doesn't even have a place
15 to put content, does it?

16 A. Correct.

17 Q. And he provided the same records for 2014-15, and 2015-16,
18 correct?

19 A. Yes.

20 Q. Did the university have a problem with Dr. Tracy's activity
21 of Global Research?

22 A. No. This is the first. We had the form, I don't know what
23 Dean Coltman would say if the form was filled out accurately.

24 Q. Did Dr. Tracy ask for any help in filling out the form?

25 A. No. Not that I know of.

1 Q. You said he filled out the form accurately?

2 A. Yes.

3 Q. What other activity does Dr. Tracy report?

4 A. You mean the other form?

5 Q. Yes.

6 A. A form for Truth Frequency.

7 Q. And how does he describe that activity?

8 A. Produce weekly current affairs program.

9 Q. And it doesn't identify the content of those programs
10 either, does it?

11 A. Correct.

12 Q. He reported using university resources for this program,
13 correct?

14 A. Yes.

15 Q. Was that a surprise to you?

16 A. Yes.

17 Q. Why?

18 A. I didn't know he was using university resources.

19 Q. So, at this point, Dr. Tracy had been told at least four
20 times by his supervisor and dean that he needed to report his
21 outside activities, correct?

22 A. Yes.

23 Q. When he finally submitted the forms, did they include his
24 activity for the memoryhole blog?

25 A. No.

1 Q. So, what did you do, Dr. Alperin?

2 A. We moved towards termination.

3 Q. And that is the document we discussed earlier this morning,
4 correct?

5 A. Correct.

6 Q. And then you disclosed to Dr. Tracy he should have reported
7 his blog, notified him of the pending termination and provided
8 him an opportunity to respond?

9 A. Yes.

10 Q. Dr. Alperin, if a faculty member is spending an hour to an
11 hour and a half a day or seven to ten hours a week on an
12 outside activity, would that be reportable?

13 A. Yes.

14 Q. Would it be a conflict of commitment?

15 A. It would be a discussion.

16 Q. Did Dr. Tracy ever disclose that he was spending one to one
17 and a half hours per day or approximately seven to ten hours
18 per week on his memoryhole blog?

19 A. No.

20 Q. If Dr. Tracy had timely reported his activity with
21 memoryhole blog, would he have received the notice of proposed
22 discipline termination?

23 A. No.

24 Q. If Dr. Tracy had reported his outside activities including
25 the activity with the memoryhole blog, but one day late, would

1 he have received this notice of proposed termination?

2 A. No.

3 Q. So, you sent Dr. Tracy the notice of proposed discipline,
4 termination we discussed earlier on December 16th?

5 A. Yes.

6 Q. Did you expect Dr. Tracy to respond?

7 A. Yes.

8 Q. Did he?

9 A. No.

10 Q. So, the termination became final, correct?

11 A. Yes.

12 *MS. GRIFFIN:* Your Honor, I would like to move
13 Defendant's 28 into evidence. It is already in evidence as
14 Plaintiffs Exhibit 46.

15 *THE COURT:* Okay, any objection?

16 *MR. BENZION:* No, your Honor.

17 *THE COURT:* Okay, Defendant's 28 is admitted without
18 objection.

19 (Whereupon Defense Exhibit 28 was marked for evidence.)

20 *MS. GRIFFIN:* May I publish?

21 *THE COURT:* Yes.

22 *MS. GRIFFIN:* I guess I already did. Sorry.

23 *BY MS. GRIFFIN:*

24 Q. Dr. Alperin, does this document explain the process for
25 challenging the termination?

1 A. Yes.

2 Q. Where?

3 A. On the last page.

4 Q. And how -- did Dr. Tracy file that grievance?

5 A. No.

6 Q. So, Dr. Tracey was given multiple directives and
7 opportunities to comply and was told of the consequences if he
8 didn't, correct?

9 A. Yes.

10 Q. Why did you decide to terminate after he failed to comply
11 with the Notice of Discipline in that final email from Dean
12 Coltman?

13 A. Because we had been dealing with this now for two months
14 and he wasn't complying and I felt this was the appropriate
15 action.

16 Q. And, Dr. Alperin, yesterday counsel asked you some
17 questions about an opinion piece that appeared in the newspaper
18 by the Pozner family, the parents of the younger victim of
19 Sandy Hook. Do you recall that article?

20 A. Yes.

21 Q. Had you and Dr. Coltman already discussed the possibility
22 of termination at the time the article was published?

23 A. Before the article was published, yes.

24 Q. Did you stay your original course after seeing that
25 article?

1 A. Yes. It had nothing to do with the decision.

2 Q. Did the public's approval of Dr. Tracy's opinions influence
3 your decision in any way?

4 A. No.

5 Q. Dr. Tracy, after -- I am sorry, Dr. Alperin, after sending
6 Dr. Tracy the proposed termination notice, you learned of
7 another outside activity he refused to report, didn't you?

8 A. Yes.

9 Q. What was that?

10 A. That is the book "Nobody Died at Sandy Hook."

11 Q. Did you review the book at that time?

12 A. Yes.

13 Q. I hand you Defendant's 3, it is excerpts of the book
14 admitted into evidence.

15 Is this the portion of the book that you reviewed?

16 A. Yes.

17 *THE COURT:* That is okay, you can finish this line of
18 questioning.

19 *BY MS. GRIFFIN:*

20 Q. Dr. Tracy is listed as a contributor?

21 A. Yes.

22 Q. What was wrong with Dr. Tracy contributing to the book?

23 A. Well, it was the way he was identified in the beginning in
24 the by bios, he was not using a disclaimer.

25 Q. So, one, I think you said Dr. Tracy's contribution should

1 have been reported, correct?

2 A. Right.

3 Q. And you said there was also a problem with the way he was
4 identified. What was the issue?

5 A. Yes, what you have on the screen.

6 He is identified as associate professor in the School of
7 Communication and Multimedia Studies at Florida Atlantic
8 University, and that violates the settlement agreement.

9 Q. And Dr. Alperin, I know you are kind of flipping through
10 pages, but when you reviewed it, did you see if the book had a
11 disclaimer?

12 A. Yes, I looked at it, there was no disclaimer.

13 Q. So, was that yet another violation of the settlement
14 agreement?

15 A. Yes.

16 Q. Did you notify Dr. Tracy of that violation?

17 A. Yes.

18 Q. Dr. Alperin, I will hand you Defendant's 216-A, which is
19 already in evidence in a redacted form.

20 MS. GRIFFIN: Your Honor, may I publish?

21 THE COURT: Yes.

22 BY MS. GRIFFIN:

23 Q. Dr. Alperin, did you know that Lawrence Glick, senior
24 associate general counsel of FAU, was talking to Dr. Tracy's
25 counsel regarding the book?

1 A. Yes.

2 Q. Let's go to page three, that second paragraph. Did you
3 know that Mr. Glick was asking for information about the steps
4 Dr. Tracy took to prevent the future use of the university
5 affiliation?

6 A. Yes.

7 Q. Did Dr. Tracy respond to your letter or provide this
8 requested information?

9 A. Not that I know of.

10 Q. Would you have terminated Dr. Tracy's employment for his
11 violation of the 2013 settlement agreement if you learned about
12 it before you decided to terminate on December 16th?

13 A. Could you repeat that?

14 Q. Sure. If you had known about the settlement agreement
15 violations, would that also be a reason you decided to
16 terminate Dr. Tracy's employment?

17 A. Yes.

18 THE COURT: Okay. I think at this time -- is this a
19 good time to take our lunch hour break?

20 MR. CURLEY: Yes.

21 MS. GRIFFIN: Yes, your Honor.

22 THE COURT: Ladies and gentlemen, we will be in recess
23 until 1:20.

24 So, I would ask that you remember the same
25 instructions, not to discuss the case, not to research the

1 case, not to review any media of the case, not to have any
2 association with anyone connected with the case, and have a
3 good lunch. Feel better for those not feeling well. We will
4 see you back at 1:20.

5 *(Thereupon, the jury leaves the courtroom.)*

6 THE COURT: All right. We will be in recess until
7 1:20.

8 *(Thereupon, a short recess was taken.)*

9 THE COURT: All right. We can bring our jurors in.
10 How much longer do you think you will be with the witness.

11 MR. BENZION: Your Honor, speaking with the Appellate
12 Court, I should make a proffer for the record.

13 THE COURT: Okay.

14 MR. BENZION: Regarding 37-L, the letter that was
15 excluded during the sidebar earlier, an email from Diane
16 Alperin to someone named Nick --

17 THE COURT: The one about the article -- her favorite
18 article?

19 MR. BENZION: Yes, your Honor. We made an argument
20 that the door was opened by Dr. Alperin when she testified
21 regarding the article and why it was her favorite, and there
22 was an argument made that opening the door doesn't cover
23 hearsay.

24 We would argue opening the door is not limited to
25 relevance, it opens the door to evidence that would otherwise

1 be inadmissible, it is not limited to just relevancy, it covers
2 hearsay as well. I cite --

3 *THE COURT:* Here is what I will ask you to do. It
4 would be helpful if you would file something with the Court,
5 file exactly what requested relief you are seeking and the
6 authority upon which you are relying, and I would encourage
7 Defense, if you want to respond, respond right away.

8 If there is something that I did in error, when I am
9 enlightened by legal authority I am sure over the course of the
10 trial we can revisit it and correct it, rather than taking up
11 the time right now. I am not going to be pulling up cases
12 right now. I would like you to submit it.

13 *MR. BENZION:* One more factual proffer for the record.
14 Opposing counsel argued that the email was written after the
15 decision to terminate and thus wasn't relevant because of this,
16 and the proffer on that would be that there were additional
17 pretextual writings from the university asserting additional
18 pretextual grounds for termination of the Plaintiff after the
19 email, that means it remains relevant in this process.

20 *THE COURT:* In the submission you make, refer to the
21 proffer, the particular exhibit and relief you are seeking, and
22 I ask Defense to respond right away.

23 *MR. CURLEY:* Well, Ms. Alperin will be here throughout
24 the trial.

25 *THE COURT:* If you think it should be corrected, but I

1 think one unifying thing, everybody wants correct rulings and a
2 clean record, so everyone should work toward that goal.

3 If I made a mistake, I want to correct it, so I look
4 forward to getting the briefing.

5 (Thereupon, the jury returned to the courtroom).

6 *THE COURT:* Welcome back, everyone. Our witness
7 remains on the stand and under oath.

8 You may proceed.

9 *MS. GRIFFIN:* Thank you, your Honor.

10 *BY MS. GRIFFIN:*

11 *Q.* Dr. Alperin, did Dr. Tracy have to provide you with copies
12 of his articles, podcasts or the book?

13 *A.* No.

14 *Q.* He just had to report what he was doing, the amount of time
15 that he was spending and whether the activity was compensated,
16 correct?

17 *A.* Correct.

18 *Q.* I believe earlier we looked through Dr. Tracy's submissions
19 and he indicated that he was using university resources for his
20 podcasts, correct?

21 *A.* Correct.

22 *Q.* Was that a violation of the collective bargaining
23 agreement?

24 *A.* Yes, he was supposed to report it.

25 *Q.* Was the refusal to disclose his being connected with the

1 memoryhole blog and his contributions to Nobody Died at Sandy
2 Hook a violation of the collective bargaining agreement?

3 A. Yes.

4 Q. So, in December 2015, the university had two faculty
5 members who both submitted incomplete and inaccurate outside
6 activity reports, correct?

7 A. Correct.

8 Q. Who were they?

9 A. Dr. James Tracy and Dr. Copeland.

10 Q. Did Mrs. Copeland have controversial speech to your
11 knowledge?

12 A. Not to my knowledge.

13 Q. And both Mrs. Copeland and Dr. Tracy were required to check
14 the box when they accepted their annual assignment, correct?

15 A. Correct.

16 Q. And both Mrs. Copeland and Dr. Tracy were specifically and
17 directly asked by their supervisors to submit reports of
18 outside activity, correct?

19 A. Correct.

20 Q. And both Mrs. Copeland and Dr. Tracy submitted incomplete
21 forms, correct?

22 A. Correct.

23 Q. And the university made the same decision with respect to
24 both faculty members, didn't it?

25 A. Correct.

1 *MS. GRIFFIN:* Your Honor, I am going to switch to
2 direct.

3 *THE COURT:* Okay.

4 **DIRECT EXAMINATION**

5 *BY MS. GRIFFIN:*

6 *Q.* Dr. Alperin, did you rely on the university's regulations
7 on discipline when making the decision to terminate Dr. Tracy's
8 employment?

9 *A.* Yes.

10 *MS. GRIFFIN:* Your Honor, may I approach and give the
11 witness Defendant's Exhibit 40?

12 *THE COURT:* Yes.

13 *BY MS. GRIFFIN:*

14 *Q.* Dr. Alperin, what is Defendant's Exhibit 40?

15 *A.* Florida Atlantic University Regulation 5.012, employee
16 standards and disciplinary procedures.

17 *Q.* And is this the document you reviewed when you made the
18 decision to discipline or take a termination step with Dr.
19 Tracy?

20 *A.* Yes.

21 *MS. GRIFFIN:* I would like to move Defendant's 40 into
22 evidence.

23 *THE COURT:* Any objection?

24 *MR. BENZION:* No objection.

25 *THE COURT:* Defendant's 40 admitted without objection.

1 *(Whereupon Defense Exhibit 40 was marked for evidence.)*

2 MS. GRIFFIN: Your Honor, may I publish?

3 THE COURT: Yes.

4 BY MS. GRIFFIN:

5 Q. Dr. Alperin, which section did you consider when making the
6 decision to prepare the proposed Notice of Discipline -- sorry,
7 notice of proposed discipline, termination for Dr. Tracy?

8 A. Are you referring to the standards for disciplinary action?

9 Q. Yes. Which section did you respond to?

10 A. I believe we did B, insubordination. Do you want me to
11 continue?

12 Q. Go ahead and list them. We will go one by one.

13 A. Okay. V, providing false information, and OO, violation of
14 state or federal law or university regulations or policies.

15 Q. How does the university define insubordination?

16 A. Insubordination is a deliberate and inexcusable refusal or
17 failure to obey a reasonable order given by a supervisor.

18 Do you want me to read the whole thing?

19 Q. No, that is fine.

20 Did you believe that that definition applied in
21 December 2015, when you issued the notice of proposed
22 discipline, termination to Dr. Tracy?

23 A. Yes.

24 Q. And what does subsection V provide?

25 A. V, providing false information to the university officials,

1 withholding requested and/or required information or the misuse
2 of university documents.

3 Q. And did you believe that section applied when you issued
4 the notice of proposed discipline, termination to Dr. Tracy?

5 A. Yes.

6 Q. And what was the final one?

7 A. OO, violation of state or federal law or university
8 regulations or policies.

9 Q. Did you believe that one applied as well?

10 A. Yes.

11 Q. Dr. Alperin, after issuing the notice of proposed
12 discipline, termination, you learned about another violation of
13 university policy, correct?

14 A. Correct.

15 Q. What was the issue?

16 A. After the notice of termination -- proposed termination was
17 issued, we learned about the book Nobody Died at Sandy Hook.
18 We didn't know about the book, and there was no disclaimer.

19 Q. Did you put Dr. Tracy on notice that this was a violation
20 of university policy?

21 A. Yes, I sent him a letter.

22 MS. GRIFFIN: I want to hand the witness Defendant's
23 78, which is marked for identification.

24 BY MS. GRIFFIN:

25 Q. Dr. Alperin, what is Defendant's 78?

1 A. This is a letter that I sent to Dr. Tracy in regard to
2 violation of the settlement agreement.

3 Q. Is it the university's regular practice to put disciplinary
4 notices in writing for faculty members?

5 A. Yes.

6 Q. And does the university maintain these documents in the
7 regular course of its business?

8 A. Yes.

9 MS. GRIFFIN: I would like to move 78 into evidence.

10 THE COURT: Any objection?

11 MR. BENZION: None, your Honor.

12 THE COURT: Defendant's Exhibit 78 is admitted without
13 objection. It previously had been marked on 12/1, so I will
14 change that to it is admitted today.

15 (Whereupon Defense Exhibit 78 was marked for evidence.)

16 MS. GRIFFIN: Your Honor, may I publish?

17 THE COURT: Yes.

18 BY MS. GRIFFIN:

19 Q. Dr. Alperin, how did Dr. Tracy violate the settlement
20 agreement?

21 A. In the first instance, he violated the settlement agreement
22 in terms of Global Research, and in the second instance, in the
23 book Nobody Died at Sandy Hook, again, there he was using his
24 university academic affiliation.

25 Q. And to your knowledge, did the book Nobody Died at Sandy

1 Hook have a disclaimer?

2 A. No.

3 Q. Was that a violation of the collective bargaining agreement
4 as well as the settlement agreement?

5 A. Yes.

6 Q. Dr. Alperin, did this letter put Dr. Tracy on notice of the
7 violations?

8 A. Yes.

9 Q. Did you offer him an opportunity to respond?

10 A. Yes.

11 Q. Is that indicated in this letter?

12 A. Yes. I asked him to respond by the end of the day
13 February 5, 2016.

14 Q. And were these separate violations of the collective
15 bargaining agreement and university policy?

16 A. Yes.

17 Q. Could Dr. Tracy have been disciplined for these actions as
18 well?

19 A. Yes.

20 Q. Would he have been disciplined for these actions if you had
21 known of them prior to the notice of termination?

22 A. Yes.

23 Q. Did Dr. Tracy ever respond to this letter?

24 A. No.

25 Q. Did Dr. Tracy respond to the notice of proposed discipline,

1 termination?

2 A. No.

3 Q. Did he respond to the notice of termination?

4 A. No.

5 Q. Do you have Defendant's 216-A in front of you?

6 A. Yes.

7 Q. The third page?

8 A. Yes.

9 Q. Was Dr. Tracy offered a separate opportunity to respond to
10 the allegation that he was violating the settlement agreement
11 as well?

12 A. Yes.

13 Q. Did he respond to that, to your knowledge?

14 A. No, not to my knowledge.

15 MS. GRIFFIN: One moment, your Honor.

16 THE COURT: Yes.

17 MS. GRIFFIN: Your Honor, we completed our direct
18 examination.

19 THE COURT: Okay, one moment.

20 At this time, from the Plaintiff, this would be your
21 redirect and cross of Dr. Alperin.

22 **REDIRECT EXAMINATION**

23 BY MR. BENZION:

24 Q. I would like to start talking about Dr. Copeland since that
25 is where your testimony began through your counsel, okay?

1 A. Okay.

2 Q. All right. You testified a moment ago that Dr. Copeland
3 was another faculty member at the same time that Dr. Tracey
4 was, right?

5 A. Correct.

6 Q. And your testimony is that she was insubordinate just like
7 Dr. Tracy, right?

8 A. She had not completed the outside employment form, and she
9 had outside employment.

10 Q. And you asked her to complete them, right?

11 A. Correct.

12 Q. And she didn't?

13 A. Correct.

14 Q. That is why you are saying she is just like Dr. Tracy?

15 A. I'm saying she is insubordinate.

16 Q. The university believes these are like corporations, Dr.
17 Copeland's situation and Dr. Tracy's situation?

18 A. Yes.

19 Q. Dr. Copeland was not blogging?

20 A. Not that I know of.

21 Q. She was not engaged in speaking activities that you thought
22 should be reportable?

23 A. Not that I know of.

24 Q. She also was not a tenured doctor?

25 A. Correct, she was an instructor.

1 Q. She wasn't full time, was she?

2 A. Yes, she was.

3 Q. She was full time?

4 A. Yes.

5 Q. Okay. As a full-time professor, she was engaged in a very
6 clear conflict of interest, wasn't she?

7 A. Yes.

8 Q. She was teaching at other universities for pay, right?

9 A. Correct.

10 Q. And she didn't tell you, did she?

11 A. Correct.

12 Q. One day you learned about those activities?

13 A. Yes.

14 Q. And you called a meeting with her?

15 A. She and the associate dean had a meeting, I was not at the
16 meeting.

17 Q. Her chair, her dean called a meeting after she learned
18 there were activities she didn't report?

19 A. Right.

20 Q. She had an obligation to call the meeting?

21 A. She called the meeting.

22 Q. Because she had an obligation to, didn't she?

23 A. She was trying to find out information.

24 MR. BENZION: Your Honor, would you please ask the
25 witness to answer the question? I am asking if she had an

1 obligation to call a meeting, and twice now she didn't answer.

2 *THE COURT:* You can answer yes or no, and then
3 explain.

4 *THE WITNESS:* I don't know why she called the meeting.
5 She called the meeting to have information, I believe she
6 thought that was her responsibility as chairperson.

7 *BY MR. BENZION:*

8 *Q.* So, as Vice Provost at Florida Atlantic University, the
9 person second in command, you don't know whether or not a dean
10 has an obligation to call a faculty member when they learn that
11 faculty member is not complying with policies?

12 *A.* The meeting was because of the complaints from students,
13 that is where it started. That is why she was meeting with the
14 faculty member, that is my understanding. I wasn't at the
15 meeting.

16 *Q.* The answer is, you, as Vice Provost, second in command,
17 don't know a dean or supervisor has an obligation to call such
18 a meeting?

19 *MS. GRIFFIN:* Objection, your Honor.

20 *MR. BENZION:* I am trying to get an answer to the
21 question.

22 *THE COURT:* The witness is trying to answer. It is
23 not helpful to try to reframe her answer in your question.
24 That is what is leading to confusion. Do it a question at a
25 time and --

1 BY MR. BENZION:

2 Q. Do you know whether or not -- Dean Coltman is the dean that
3 met with Dr. Copeland, right?

4 A. I don't believe so. I believe the meeting was with the
5 chairperson of the department of language and the associate
6 dean.

7 Q. Okay. As you sit here today, do you know whether or not an
8 associate dean has an obligation to meet with a faculty member
9 when they learn the faculty member is not complying with
10 university policies?

11 A. I think they felt she had responsibility to.

12 Q. You attended that meeting, did you not?

13 A. No, I did not.

14 Q. You didn't?

15 A. No.

16 Q. Okay. You testified a moment ago that Dr. Copeland was
17 fired; isn't that true?

18 A. Correct.

19 Q. Can we publish Defendant's 206, please.

20 Isn't it true that immediately after the meeting that Dr.
21 Copeland had with her supervisor that she resigned at Florida
22 Atlantic University?

23 A. Correct.

24 Q. So, you didn't fire her?

25 A. Yes, we did terminate her after this.

1 Q. We heard a few mantras; comply and grieve. Is this the
2 mantra if you quit, you are fired?

3 MS. GRIFFIN: Objection.

4 THE COURT: Sustained.

5 BY MR. BENZION:

6 Q. Isn't it true -- when Dr. Copeland sent this letter of
7 resignation to Florida Atlantic University, she had no
8 intention of responding and turning in forms; isn't that true?

9 MS. GRIFFIN: Objection, your Honor, foundation.

10 THE WITNESS: I had no idea --

11 THE COURT: Wait. The witness can answer if she can.

12 THE WITNESS: I don't know what she was thinking.

13 BY MR. BENZION:

14 Q. Would you expect somebody to turn in forms after they
15 resign?

16 A. She was resigning on December 4th, effective December 31st.

17 Q. Okay. So, in the meantime, you thought let's terminate her
18 before her resignation is effective?

19 A. I felt we shouldn't pay her for the month of December when
20 she wasn't working.

21 Q. Could you go back up.

22 I want to take note here, Dr. Copeland's address is Boca
23 Raton, Florida?

24 A. Yes.

25 Q. Scroll down, please.

1 Why did you send this termination notice to Tallahassee?

2 A. I don't know. I didn't send the letter.

3 Q. So, you don't know why the termination letter went to an
4 address that is different than the address Dr. Copeland sent
5 her resignation letter from?

6 A. No.

7 Q. Was someone hoping she wouldn't respond to the notice of
8 proposed termination?

9 *MS. GRIFFIN:* Objection, your Honor, foundation.

10 *THE COURT:* Sustained.

11 *BY MR. BENZION:*

12 Q. A moment ago you seemed to know a lot about the situation.
13 Now you don't know what happened with this letter here.

14 *MS. GRIFFIN:* Objection, your Honor, argumentative.

15 *THE COURT:* Sustained.

16 *BY MR. BENZION:*

17 Q. Do you know if Dr. Copeland even received this notice of
18 termination letter?

19 A. I don't know.

20 Q. Somebody can't respond to a letter they don't receive,
21 right?

22 A. Correct.

23 Q. Scroll down, please.

24 Do you see this number here?

25 A. Yes.

1 Q. 64751582?

2 A. Yes.

3 Q. That is the tracking number for the certified mail you
4 sent, right?

5 A. Sent by the college, correct.

6 Q. Right.

7 MR. BENZION: I am going to show the witness what is
8 marked as Plaintiff's 206 for identification purposes.

9 I don't think the Court -- this is the Plaintiff's ID
10 of this exhibit.

11 THE COURT: Plaintiff's 206?

12 MR. BENZION: Yes, your Honor.

13 THE COURT: Do you have a hard copy?

14 MR. BENZION: May I approach the witness with
15 Plaintiff's 206.

16 THE COURT: Yes.

17 BY MR. BENZION:

18 Q. Please look at the tracking number at the top of
19 Plaintiff's Exhibit 206.

20 A. Yes.

21 Q. That is the same tracking number for the certified mail to
22 Dr. Copeland, isn't it?

23 A. Yes.

24 Q. I want you to look down at the December 18 notification,
25 Plaintiff's 206.

1 *MS. GRIFFIN:* Objection, identifying hearsay in the
2 document.

3 *THE COURT:* What are you calling 206? Do you have an
4 extra copy?

5 *MR. BENZION:* I do, I will hand it when I am done.

6 *THE COURT:* You don't have another copy? What are you
7 calling it?

8 *MR. BENZION:* USPS tracking result.

9 *THE COURT:* What is the pending question?

10 *BY MR. BENZION:*

11 *Q.* Dr. Alperin, isn't it true this certified mail letter never
12 made it to Dr. Copeland?

13 *A.* It says December 18, undeliverable as addressed.

14 *Q.* You don't have any knowledge that it ever got to her?

15 *A.* I don't have that knowledge, correct.

16 *Q.* That may be a reason why she didn't reply, correct?

17 *MS. GRIFFIN:* Argumentative.

18 *THE COURT:* It calls for speculation why she didn't
19 reply unless this person has personal knowledge. If you don't
20 have personal knowledge, you can't answer the question.

21 *THE WITNESS:* I don't have personal knowledge.

22 *BY MR. BENZION:*

23 *Q.* After that meeting that was called with Dr. Copeland, she
24 didn't even write any letters to her supervisor saying that she
25 was confused about the policy, right?

1 A. Not that I know of.

2 Q. She didn't ask for any clarification about the policy,
3 right?

4 A. Not that I know of.

5 Q. She just left the school, right?

6 A. As far as I know.

7 Q. So, it is your testimony that that is the same situation as
8 Dr. Tracy?

9 A. Yes.

10 Q. Let's talk about -- take 206 off, please. Thank you.

11 Let's talk about the response options Dr. Tracy had. You
12 listed a bunch of options, ways he could have responded to the
13 discipline against him in 2015. Do you remember testifying
14 about that?

15 A. Yes.

16 Q. Okay. One of the ways, you said Dr. Tracy could have
17 brought his concerns to the Academic Freedom and Due Process
18 Committee in the faculty center, right?

19 A. Right.

20 Q. Isn't it true another faculty member raised a concern about
21 the conflict of interest --

22 MS. GRIFFIN: Objection, this was addressed in
23 pretrial orders.

24 MR. BENZION: This door has been opened. I am
25 asking --

1 *THE COURT:* If I made a ruling -- I made a lot of
2 rulings. There is to be no questioning in contravention of the
3 Court's ruling. If it is a matter you want to take it up at
4 another point, take it up at another point. If it was not
5 permitted to be covered, comply with the Court ruling and at a
6 separate moment let me know why there is something different.

7 *MR. BENZION:* I will move forward now and bring it to
8 the Court's attention outside the presence of the jury.

9 *THE COURT:* Thank you.

10 *BY MR. BENZION:*

11 *Q.* Let's continue with Dr. Tracy's options to respond. You
12 said he didn't file a grievance in response to the notice of
13 proposed termination?

14 *A.* Correct.

15 *Q.* And didn't file a grievance in response to the January 4
16 letter regarding the book, right?

17 *A.* Correct.

18 *Q.* He filed this lawsuit?

19 *A.* Yes.

20 *Q.* That is a response, isn't it?

21 *A.* I guess so.

22 *Q.* When you said he didn't respond, that wasn't true, was it?

23 *A.* I think the question was what were his other options, and I
24 explained the other options.

25 *Q.* You said he didn't respond at all?

1 A. He didn't respond at that time, correct. We are talking
2 about --

3 MS. GRIFFIN: I was going to object if he was going to
4 ask again. At this point, it was asked and answered and
5 mischaracterizes the testimony.

6 MR. BENZION: I didn't ask a question. I don't know
7 what to respond to.

8 THE COURT: The question was, you said he didn't
9 respond at all.

10 MR. BENZION: And it was answered.

11 THE COURT: Right, right, that was answered.

12 BY MR. BENZION:

13 Q. A moment ago, do you remember testifying the forms that Dr.
14 Tracy did turn in in December 2015, those were complete and
15 accurate, right?

16 A. Yes.

17 Q. So, you didn't have any problem with those forms, right?

18 A. At that time, correct.

19 Q. And you wouldn't have terminated for what was on those
20 forms, right?

21 A. I don't believe so, correct.

22 Q. Even the ones involving the use of university resources?

23 A. The forms require the approval of his director and his
24 dean. That would need to happen first, and then it would come
25 to me and I would make a decision based upon their decision.

1 Q. The activity that wasn't on the form that caused Dr. Tracy
2 to be terminated was the blog?

3 A. The activity on the memoryhole blog, yes. He didn't submit
4 that form.

5 Q. He didn't turn in those forms until December 2015, right?
6 The forms he turned in, he didn't turn them in until
7 December 15, 2015, right?

8 A. Correct.

9 Q. When he turned them in, you were looking for something
10 else?

11 A. I was looking for an additional thing.

12 Q. The blog?

13 A. Yes.

14 Q. The blog you knew about at that time?

15 A. Yes.

16 Q. The blog you read previously?

17 A. In 2013.

18 Q. You didn't read it at all in 2015; is that your testimony?

19 A. Yes.

20 MR. BENZION: Publish 36, please, the November 22nd
21 letter. Let's publish the 12/10 email, please.

22 BY MR. BENZION:

23 Q. You testified a moment ago that it wasn't that scandalous
24 Pozner article published on December 10 that made Dean Coltman
25 write that letter on December 10, right?

1 A. Correct.

2 MS. GRIFFIN: Objection, mischaracterizes the
3 testimony.

4 THE COURT: The best way to ask these questions -- I
5 know you can do your cross-examination and you can do leading,
6 but to try to rephrase. Prior testimony is causing all sorts
7 of confusion. The trial is what it is. The safer course of
8 action is to ask the question without trying to rephrase what
9 the prior testimony was.

10 MR. BENZION: I will do my best to avoid that, your
11 Honor.

12 THE COURT: Okay.

13 BY MR. BENZION:

14 Q. It wasn't that Pozner article that caused this termination
15 letter to be written, right?

16 A. Yes, that is my testimony.

17 Q. And when Dr. Tracy wrote this November 22nd letter, you
18 hadn't yet decided to terminate him at that point, right?

19 A. Correct.

20 Q. Sometime between November 22 and December 10, there was a
21 decision made to draft a termination letter for Dr. Tracy,
22 right?

23 A. Correct.

24 Q. When?

25 A. I don't remember the exact date.

1 Q. You don't remember the exact date, but you are sure it
2 wasn't after the publication of the article?

3 A. No. As I said, this is a serious decision and we were
4 working on a letter that we might send.

5 This situation started in October, before the Pozner
6 letter.

7 Q. But it didn't rise to the level of a termination situation?

8 A. Until November.

9 Q. Until November?

10 A. Yes.

11 Q. When in November?

12 A. I don't know the exact date, but it was in November.

13 Q. Not in December?

14 A. No.

15 Q. This document on the screen here, this is the only document
16 we have to show when you began contemplating termination
17 against Dr. Tracy; isn't that true?

18 A. This is a draft, I believe a draft letter.

19 Q. You are not aware of any other document or email that shows
20 that you were contemplating termination before this time, are
21 you?

22 A. I'm not aware.

23 MR. BENZION: Publish 23, please. Scroll down some,
24 please.

25

1 BY MR. BENZION:

2 Q. A moment ago, do you remember talking about this signed
3 statement that Dr. Tracey was asking for?

4 A. I don't --

5 Q. Maybe you could read that paragraph one more time.

6 A. "In light of the above, I would be much more comfortable
7 signing the assignment with these qualifications. If the
8 administration or its counsel can produce a signed statement
9 asserting its position that my personal activities, media
10 criticism, alternative journalism, blogging, in no way
11 constitute legitimate intellectual/creative endeavors and
12 cannot be conflict of interest, conflict of commitment, or
13 outside activities as defined by the administration's policy
14 addressing such concerns."

15 Q. Nobody responded to this question here with a yes or no;
16 isn't that true?

17 A. I know I talked to the dean. I don't know what was
18 transmitted to Dr. Tracy.

19 Q. It would have been easy to say to Dr. Tracy, your blog is
20 reportable, right?

21 A. I believe that message was sent.

22 Q. In his termination letter, right?

23 A. Yes.

24 Q. Do you remember testifying a moment ago about the personnel
25 file?

1 A. Yes.

2 MR. BENZION: Your Honor, I am going to refer the
3 witness to 95-A, interrogatory number 25.

4 THE COURT: Okay, 95-A has been marked already.

5 MR. BENZION: Yes, your Honor.

6 THE COURT: Is this a different interrogatory?

7 MR. BENZION: It is a different interrogatory.

8 THE COURT: Is there any objection?

9 MS. GRIFFIN: No objection.

10 THE COURT: Let me remind the jurors of the
11 instruction on interrogatories.

12 Ladies and gentlemen, you will now -- the witness,
13 Diane Alperin, you will hear answers that she gave in response
14 to written questions that the Plaintiff submitted. The
15 questions are called interrogatories. Before trial Diane
16 Alperin gave the answers in writing while under oath. You must
17 consider the answers as though she gave the answers on the
18 witness stand.

19 MR. BENZION: May we publish the question and answer,
20 your Honor?

21 THE COURT: Yes. Any objection to that?

22 MS. GRIFFIN: Just that one interrogatory?

23 MR. BENZION: Just 25 and the answer.

24 MS. GRIFFIN: No objection.

25 THE COURT: Question 25 and the answer?

1 MR. BENZION: That is correct, your Honor.

2 THE COURT: Okay.

3 MR. BENZION: Thank you for the Court's patience.

4 All right.

5 BY MR. BENZION:

6 Q. "25. Explain why, in 2016, the March 28, 2013 Notice of
7 Discipline and Defendant Coltman's notes were produced to
8 multiple media outlets along with approximately 700 other
9 records collectively labeled Plaintiff's personnel file.

10 Response: Defendant university objects to Plaintiff's
11 description of the public records produced as 'collectively
12 labeled Plaintiff's personnel file.' The public records
13 requests made in 2016 were broader than a request for
14 Plaintiff's personnel file and the documents produced in
15 response to that series of public records requests were broader
16 in scope and contained additional documents other than those
17 contained within Plaintiff's personnel file.

18 "In December 2015, Defendant university began receiving
19 public records requests for various categories of publicly
20 available documents related to Plaintiff's employment. For
21 efficiency, Defendant university gathered all publicly
22 available documents related to employment for production. The
23 documents produced included records from multiple offices,
24 including the dean's office.

25 Dr. Alperin, you answer that question, right?

1 A. Yes.

2 Q. And you did so under oath, right?

3 A. Yes.

4 Q. And you stand by that answer today, right?

5 A. Yes.

6 MR. BENZION: May I approach the witness, your Honor?

7 THE COURT: Yes.

8 MR. BENZION: I am showing the witness Plaintiff's
9 Exhibit 11-B.

10 BY MR. BENZION:

11 Q. Dr. Alperin, this document I placed in front of you is an
12 invoice, correct?

13 A. That is what it is labeled.

14 Q. Okay. And it has FAU's logo on the top?

15 A. Yes.

16 Q. It comes from the Division of Public Affairs, correct?

17 A. Correct.

18 Q. This is the type of invoice that is produced when somebody
19 requests public records from the university, right?

20 A. I guess so.

21 Q. And this is an invoice that is regularly kept in the
22 regular course of business at Florida Atlantic University when
23 somebody requests a public record?

24 A. I don't know.

25 MS. GRIFFIN: Objection, foundation and completeness.

1 This is not all the public records requests that were made.

2 THE COURT: Are you just talking about the invoice
3 itself, is this the only document in 11-B?

4 MR. BENZION: It is, yes.

5 THE COURT: Okay, overruled to the extent counsel can
6 keep asking these questions.

7 BY MR. BENZION:

8 Q. Are you saying you don't know that this is a document the
9 university keeps as a record?

10 A. I see it is a university document. I don't work in the
11 Division of Public Affairs.

12 Q. Do you have any reason to doubt this is a document produced
13 by the Division of Public Affairs?

14 MS. GRIFFIN: Objection, she answered the question.
15 She is without foundation.

16 MR. BENZION: That is a different question.

17 THE COURT: Overruled.

18 BY MR. BENZION:

19 Q. Do you have any reason to doubt this is a document prepared
20 by the university?

21 A. No. I don't doubt that.

22 MR. BENZION: I seek to move this into evidence,
23 Plaintiff's 11-B.

24 THE COURT: Response.

25 MS. GRIFFIN: It is hearsay and the foundation is not

1 laid that she has sufficient knowledge to meet the business
2 records exception.

3 MR. BENZION: It is an admission.

4 THE COURT: 803(6) has been met by this witness.

5 MR. BENZION: But it is an admission, your Honor,
6 under 801.

7 THE COURT: Response.

8 MS. GRIFFIN: He still has not laid the foundation,
9 your Honor, that she would have the knowledge regarding Rachel
10 Hollingsworth. She indicated she doesn't know if these are
11 documents they regularly keep and maintain, and also the
12 completeness objection, your Honor.

13 MR. BENZION: Response.

14 THE COURT: What is the response?

15 MR. BENZION: The response is, she says the document
16 has an FAU label on it --

17 THE COURT: Why don't we go sidebar.

18 (Proceedings at sidebar.)

19 THE COURT: Okay. So, the only thing that I saw is
20 the exhibit was an invoice, correct?

21 What exhibit are we talking about, 11-B, Plaintiff's?

22 MS. GRIFFIN: Plaintiff's 11-B. The issue with the
23 completeness, Dr. Tracy's request was the file produced to
24 media outlets, and 11-A is not all of the requests. It is
25 misleading for the jury to use an incomplete set of documents.

1 *THE COURT:* What is 11-A?

2 *MS. GRIFFIN:* 11-A are single public records the Court
3 has ruled are hearsay and as we objected as hearsay.

4 *THE COURT:* 11-B is?

5 *MS. GRIFFIN:* One invoice, where Dr. Tracy's request
6 was for all of the records that were produced pursuant to the
7 public records request. It is misleading.

8 *MR. FEICHT:* You may recall earlier today Dr. Alperin
9 testified there were dozens of public records requests to
10 different departments. They showed the interrogatory answer
11 that suggested that there is a centralized response.

12 This is one of those. It doesn't show all of the
13 requests, it is misleading to suggest this covers everything.
14 The only foundation laid, there are so many public requests for
15 Dr. Tracy's employment, it is misleading.

16 *THE COURT:* First of all, it is not 803(6), because
17 she couldn't establish this is kept in the ordinary course of
18 regularly conducted activity. It cannot come in under 803(6)
19 as a record of regularly conducted activity, at least through
20 this witness.

21 With respect to 801(d)(2) --

22 *MR. BENZION:* 801(d)(2)(A), I am sorry, you were going
23 there.

24 *THE COURT:* 801(d)(2)(A).

25 *MR. FEICHT:* This is not an admission, this is an

1 invoice.

2 *THE COURT:* I have to look into whether this is an
3 admission, whether this meets the definition of admission.

4 Here is what I am going to do. Unless you have a
5 case, I am going to have to look into it. This came up before,
6 11-B, and it was never resolved. If you are trying to get it
7 in under 801(d)(2)(A), it is -- it has to be a statement that
8 meets the following provisions: Not hearsay, made by an
9 opposing party and made in an individual and representative
10 capacity.

11 We are not arguing about Rachel Hollingsworth, this
12 being within the scope of what she does, I am not hearing that
13 within the argument, but I am not sure an invoice is a
14 statement, quite honestly.

15 *MR. BENZION:* These matters set forth are statements
16 of the university, and it is impeachment evidence. They are
17 saying they did not produce the personnel file, yet in 11-B --

18 *THE COURT:* You have to keep your voice down.

19 *MR. BENZION:* I apologize. In 11-B, they are saying a
20 copy of James Tracy's personnel file produced to media outlets.
21 In 11-A, which is where I am going next, you have media outlets
22 requesting his personnel file.

23 *MS. GRIFFIN:* Those are incomplete and misleading to
24 the jury, particularly Dr. Tracy's own request for public
25 records. He labeled it as all public documents produced to the

1 media. Without having the entire exhibit for consideration, it
2 will mislead the jury and prejudice the university.

3 MR. FEICHT: This is one piece of it. Are all of the
4 public requests coming in?

5 MR. BENZION: Was anything produced?

6 MR. LEO: These are individual requests. You may talk
7 about them, that they are all together, that is not true.
8 Talking about misleading, this is an invoice --

9 THE COURT: Well, misleading can be corrected on
10 redirect.

11 MR. FEICHT: It is a incompleteness directed to the
12 fact they are trying to say this is the public records request
13 and misleads the jury in thinking because this is one of them,
14 this is all of them.

15 THE COURT: Can't you clean this up on redirect?

16 MR. FEICHT: This is prejudicial because we explained
17 the number of public record requests is broader than this. Now
18 they are going to say --

19 THE COURT: You are saying this is just one public
20 records request.

21 MS. GRIFFIN: Correct.

22 THE COURT: Are there are invoices for other public
23 records requests. They cherry picked out certain public record
24 requests.

25 MR. BENZION: We didn't cherry pick this, he received

1 something called the personnel file produced to the media, and
2 they are saying we did not produce the personnel file to the
3 media, and they were given the opportunity to explain that.
4 Now they should be made to explain why we produced more than
5 the personnel file.

6 *MS. GRIFFIN:* The explanation for that the public
7 records request, as the interrogatory stated, is incomplete.
8 You have to look at all public records requests. This is the
9 invoice in response to Dr. Tracy's, which is four documents
10 produced over all of the others. This is incomplete.

11 *MR. BENZION:* That goes to weight, not admissibility.
12 They had the opportunity to do it. They can call Rachel
13 Hollingsworth.

14 *THE COURT:* You have Rachel Hollingsworth on the list?

15 *MS. GRIFFIN:* She is not on either list, your Honor.
16 They didn't list her either.

17 *MR. BENZION:* It was no mystery we were going in this
18 direction.

19 *THE COURT:* What else do you have to ask the witness
20 about? Do you have any other areas to cover?

21 *MR. BENZION:* Yes.

22 *THE COURT:* Cover the other areas.

23 (Sidebar concluded.)

24 *THE COURT:* We are going to move on to a different
25 subject at this point, Dr. Alperin.

1 BY MR. BENZION:

2 Q. I just want to get something clear here, not all outside
3 activities are reportable, right?

4 A. If you are referencing personal activities.

5 Q. As opposed to what?

6 A. Professional activities are reportable, outside employment.
7 There are a list of things reportable in the documents we have
8 gone through, correct.

9 Q. That is what I am trying to get to. There is a category of
10 outside activities that are reportable, and a category of
11 outside activities that are not reportable, right?

12 A. Correct.

13 Q. And if you are doing one of those activities that are not
14 reportable, then you don't have to fill out an outside activity
15 form, right?

16 A. It would appear so.

17 Q. And if you are not doing a reportable activity and if you
18 are not -- sorry, using a report of outside activity form, you
19 don't have to use the use of equipment form, do you?

20 A. If you are not reporting an activity and you are not using
21 equipment.

22 Q. It sounds like you are confused. Let's back up, okay.

23 I am talking about an activity that is not reportable, all
24 right?

25 An activity that is not reportable doesn't have to be

1 reported on an outside activities form, right?

2 A. Okay.

3 Q. If I am engaging in that activity not reportable and it
4 doesn't go on a form, and I use my computer to send an email at
5 the school, I don't have to put that on use of equipment form,
6 right?

7 A. Who are you sending the email about?

8 Q. My non-reportable outside activity.

9 A. I guess -- I am not putting this in context, but if you are
10 not using -- I don't understand why you would be using your
11 computer for personal activity.

12 Q. Okay. We talked about there are activities you can do
13 outside the university, not reportable?

14 A. Yes.

15 Q. Sometimes you might use a university resource when you do
16 those activities, right?

17 *MS. GRIFFIN:* Objection, we are getting cumulative.
18 This is asked in a hypothetical format, it is inappropriate.

19 *THE COURT:* I would ask to stay away from areas you
20 have covered.

21 *MR. BENZION:* I do not believe this has been covered.

22 *THE COURT:* The equipment use form has been covered.

23 Is there something in particular you want to ask the
24 witness that has not been covered?

25 *MR. BENZION:* I am trying to clarify what the actual

1 policy is on the form. I believe it hasn't been made clear
2 yet. May I approach with Plaintiff's Exhibit 3, your Honor?

3 *THE COURT:* Yes.

4 *BY MR. BENZION:*

5 Q. Can you please read the two lines at the top of this
6 document?

7 A. You mean the headers?

8 Q. Yes.

9 *MS. GRIFFIN:* We have no objection to it being
10 admitted if we are going to read from it.

11 *MR. BENZION:* Sure, I will move this into evidence,
12 Plaintiff's 3, at this time.

13 May we publish, your Honor?

14 *THE COURT:* Plaintiff's Exhibit 3 is admitted without
15 objection.

16 (Whereupon Plaintiff Exhibit 3 was marked for evidence.)

17 *THE COURT:* It was previously marked yesterday. So,
18 now we will change that to it is now admitted.

19 *BY MR. BENZION:*

20 Q. Okay. University equipment facilities and services, and
21 right below that, for use with report of outside employment or
22 professional activity form, correct?

23 A. Correct.

24 Q. This document is only used with the report of outside
25 employment or professional activity form, right?

1 A. That is what it appears.

2 Q. If a faculty member is engaged in an outside activity not
3 reportable and they use a university resource, they don't have
4 to put that on this form, right?

5 A. Not on this form.

6 Q. Like if a faculty member uses the telephone in the office
7 and calls someone not having to do with the job?

8 A. When they get the bill they have to report that they made
9 the call for personal use, not business.

10 Q. Are you saying local calls outside a professor's office?

11 A. I am not sure exactly what -- I get a bill and it shows
12 things that are included and things that I have to certify for
13 business and not for business.

14 Q. What is the definition of incidental use at the university?

15 A. You use it once or twice.

16 Q. You think?

17 A. That is what it says -- you asked me my opinion, not on a
18 regular basis.

19 Q. I am not asking your opinion. I am asking what the actual
20 rule is at the university.

21 A. It says on a noninterference basis, no more than normal
22 depreciation the equipment experiences, and use of facilities
23 and services will not result in added expenses to the
24 university.

25 Q. Publish Article 19.

1 Full performance of the employee's duties, this is the
2 conflict of interest, outside activities policy?

3 A. Yes.

4 Q. Where is the full performance of obligations defined?

5 A. I'm not sure I understand the question.

6 Q. Well, in order for somebody to know what the full
7 performance of their duties are, that would have to be defined
8 somewhere, right?

9 A. Yes.

10 Q. Where is that term defined?

11 A. Well, one, there is another part of the collective
12 bargaining agreement that talks about assignment, instruction,
13 research, and the faculty member also gets an assignment, an
14 annual assignment that we talked about today and perhaps
15 yesterday.

16 Q. It is not defined in this article, is it?

17 A. I don't believe so.

18 Q. Okay. How about the public interest of the university,
19 public interest of the university, that is not defined in this
20 article either, is it?

21 A. You know, I think it is clear, but I don't see that it is a
22 definition, correct.

23 Q. Okay. Compensated, that is not defined either, is it?

24 A. I believe people understand what compensated is.

25 Q. Would you agree that if somebody pays you for writing an

1 article, that is different than if somebody gives you money and
2 doesn't expect anything in return?

3 A. It would be nice, people giving me money and not expecting
4 anything in return. That is a scenario you have to explain.

5 Q. Okay. Someone offers to pay you money for you to write
6 them an article versus someone just giving you money and
7 expecting nothing in return.

8 MS. GRIFFIN: Objection, your Honor, asked and
9 answered and improper hypothetical.

10 MR. BENZION: She didn't answer the question.

11 BY MR. BENZION:

12 Q. Uncompensated activity is not defined here, is it? The
13 term "uncompensated" is not defined here?

14 A. It is an activity not compensated.

15 Q. Not all uncompensated activities are reportable?

16 A. Correct.

17 Q. So this must refer to some category of uncompensated
18 activities that are reportable.

19 MS. GRIFFIN: Objection, cumulative again.

20 THE COURT: Overruled.

21 BY MR. BENZION:

22 Q. Which category of uncompensated activities is this
23 referring to?

24 A. Professional practice, consulting, teaching or research.

25 Q. Let's talk about those activities. Does this mean

1 professional practice, professional consulting, professional
2 teaching and professional research, does it mean that, or does
3 it just mean professional practice and then just consulting,
4 just teaching and just research?

5 *MS. GRIFFIN:* Objection, cumulative. We have been
6 through the definition before.

7 *MR. BENZION:* I am asking the university's --

8 *THE COURT:* No speaking responses. I will overrule
9 the objection. I ask counsel to be mindful of not being
10 repetitive and cumulative, ask areas that you want to cover on
11 cross or redirect.

12 *MR. BENZION:* I have not covered this before.

13 *THE COURT:* Proceed.

14 *THE WITNESS:* Professional practice, consulting,
15 teaching or research.

16 *BY MR. BENZION:*

17 *Q.* You believe it means what it says; is that what you are
18 saying?

19 *A.* Okay.

20 *Q.* Does this mean professional consulting or any consulting?

21 *A.* I think it means any consulting.

22 *Q.* Professional teaching or any teaching?

23 *A.* I believe it means any teaching.

24 *Q.* Does this mean professional research or any research?

25 *A.* Any research.

1 Q. If a faculty member teaches history and on the weekends
2 teaches yoga to his friends for free, is that reportable?

3 A. I believe people reported that.

4 Q. It is a reportable activity?

5 A. Can be.

6 Q. And cannot be, too?

7 A. May not be.

8 Q. Who decides?

9 A. That faculty member in consultation with his supervisor.

10 Q. In your tenure at Florida Atlantic University, you have
11 seen a lot of reported activity, professional activity forms,
12 right?

13 A. Yes.

14 Q. How long have you been applying the outside activities
15 policy to blogging at the university?

16 A. I apply it to a medium, I don't apply it specifically to
17 blogging.

18 Q. Isn't it true in all of your years and all the forms you
19 looked at at the university, you are not aware of any faculty
20 member who reported blogging on an outside activity form?

21 A. I cannot recall.

22 Q. Why doesn't the outside activity form say anything about
23 teaching, research or consulting here?

24 A. I believe they would be under employment, other
25 professional activity or other compensated activity.

1 Q. What about uncompensated activities, where do you report
2 those here?

3 A. Other professional activity.

4 Q. What if it is not professional, like teaching yoga, where
5 does that go?

6 MS. GRIFFIN: Objection, these are objected to
7 hypotheticals.

8 THE COURT: Sustained.

9 BY MR. BENZION:

10 Q. Where would other activities go?

11 A. Under professional.

12 Q. Unprofessional, non-compensated activity maybe a
13 professional activity?

14 A. Maybe.

15 Q. Maybe there should be another box here for uncompensated
16 activity, right?

17 MS. GRIFFIN: Objection, argumentative.

18 THE COURT: Sustained.

19 MR. BENZION: One moment, a few more questions.

20 BY MR. BENZION:

21 Q. Dr. Alperin, do you recall testifying about the public's
22 disapproval of Dr. Tracy's opinions in 2015?

23 A. I remember talking about emails.

24 Q. And it is your testimony here today that the public
25 disapproval of Dr. Tracy's opinions did not influence your

1 decision in 2015, correct?

2 A. Correct.

3 Q. In 2015, there was widespread disapproval of Dr. Tracy's
4 opinions, right?

5 MS. GRIFFIN: Objection, your Honor, foundation.

6 THE COURT: Sustained.

7 BY MR. BENZION:

8 Q. You are aware that in 2015, there was widespread
9 disapproval of his opinions, right?

10 A. There was some disapproval, correct.

11 Q. It is your testimony here today that you would have given
12 just as harsh a punishment to some faculty member at the
13 university who wasn't causing embarrassment to the university?

14 A. I don't understand the question.

15 Q. You terminated Dr. Tracy because of alleged violations of
16 the university's policies, correct?

17 A. Correct.

18 Q. Can we publish 40.

19 You needed just cause to terminate Dr. Tracy, correct?

20 A. Correct.

21 Q. This document here you testified about during your
22 attorney's questioning, this is -- just cause is defined here,
23 right?

24 A. Yes.

25 Q. Right here, just cause. 1. Procedure: Disciplinary

1 action shall be taken only for just cause. The disciplining
2 authority shall review alleged defenses to determine -- and
3 there is a list of things they should determine, right?

4 A. Yes.

5 Q. One thing they should determine is that the offense
6 adversely affects the employee's abilities to perform assigned
7 duties.

8 Isn't it true you did not determine that before Dr. Tracey
9 was terminated?

10 MS. GRIFFIN: Objection, your Honor, there is an "or"
11 in there. They are taking it out of context. The document
12 speaks for itself.

13 THE COURT: If you refer to the document, refer to the
14 language of the document.

15 BY MR. BENZION:

16 Q. Job related offenses, whether the offense occurred while
17 the employee was at work or is job related. If offense occurs
18 while the employee is off duty and away from the job, any
19 disciplinary action taken must be preceded by a decision,
20 supported by facts, that the offense adversely affects the
21 employee's ability to perform assigned duties or the
22 university's ability to carry out its mission and purposes.

23 You did not make a decision that the events adversely
24 affected Dr. Tracy to perform his assigned duties, did you?

25 A. This is not what this is about. He was terminated for

1 insubordination within the university.

2 This particular article, as I recall, has to do with when
3 an offense occurs when the person is off duty and away from the
4 job and that offense could adversely affect their ability to
5 perform their duties. This has to do with things like child
6 abuse, sexual assault, those kinds of things that happen
7 outside the university.

8 Q. Dr. Tracey was on paternity leave when he was terminated?

9 A. Yes.

10 Q. Off duty?

11 A. He was being paid by the university.

12 Q. This doesn't say anything about compensation here, does it?

13 A. No, but he was being paid when he was on paid parental
14 leave.

15 Q. Let's talk about D, past practice, whether the proposed
16 discipline is consistent with past treatment of employees who
17 have committed similar offenses.

18 How about with respect to Dr. Tracy, in 2013, you
19 acknowledge he said that he wasn't going to turn in a form for
20 his blog, right?

21 A. Yes.

22 Q. And that is the very thing he was terminated for in 2015?

23 A. Yes.

24 Q. In 2013, he was not disciplined for the same conduct, was
25 he?

1 A. Correct.

2 Q. How is that consistent?

3 A. Past treatment of employees who committed similar offenses,
4 we have terminated other employees for insubordination.

5 Q. Dr. Tracy is an employee?

6 A. Correct.

7 Q. Wouldn't you compare the employee to the same employee in
8 the past?

9 A. To the same employee?

10 Q. Yes.

11 A. I don't think that is what it is saying.

12 Q. Appropriateness of discipline, whether the severity of
13 discipline is reasonably related to the seriousness of the
14 offense and employee's past record of work performance, conduct
15 and discipline.

16 You didn't look at Dr. Tracy's teaching evaluations before
17 you terminated him, right?

18 MS. GRIFFIN: Objection, that mischaracterizes the
19 testimony and cumulative and outside the scope.

20 THE COURT: You've covered that. You have asked the
21 witness already about her knowledge of the evaluation of Dr.
22 Tracy.

23 BY MR. BENZION:

24 Q. So, then, you admit that in not reviewing his teaching
25 evaluations, you did not assess his past work performance

1 before you disciplined him and terminated him, right?

2 MS. GRIFFIN: Objection, argumentative.

3 THE COURT: Sustained.

4 BY MR. BENZION:

5 Q. You said you terminated Dr. Tracy for insubordination,
6 right?

7 A. Yes.

8 Q. Right?

9 A. Yes.

10 Q. Here is insubordination, right here, right, a deliberate
11 and inexcusable refusal or failure to obey.

12 Is it your testimony here today all of the requests for
13 clarification were deliberate and inexcusable?

14 A. He was not disciplined for responding to his supervisor.
15 He was disciplined for failure to obey a reasonable order.

16 Q. Right. It is your testimony that failure to obey was
17 deliberate and inexcusable?

18 A. Yes.

19 Q. Publish the guidelines, please. Scroll down a little bit,
20 please, slowly. Wait, let's go to the top one moment.

21 These guidelines are meant to do what?

22 A. To play forth the outside guidelines, to help employees
23 understand the guidelines.

24 Q. Help them understand?

25 A. Yes.

1 Q. Scroll very slowly. Look at all of the forms referenced
2 within these guidelines, one, two, three --

3 MS. GRIFFIN: Objection, this is cumulative.

4 MR. BENZION: This is not cumulative.

5 THE COURT: This has been reviewed. What is the
6 particular question of the witness?

7 BY MR. BENZION

8 Q. There are many documents and forms and policies that make
9 up the conflict of interest, outside activity policies, right?

10 A. Yes.

11 Q. Okay. So, it is your testimony here today that Dr. Tracy's
12 confusion about the conflict of interest, outside activities
13 policy made up of all of the information and policies was
14 inexcusable?

15 A. I don't believe he was confused.

16 Q. You hold that belief despite never meeting with him in
17 2015, right?

18 A. Yes.

19 MR. BENZION: No further questions.

20 THE COURT: Any response -- anything further from the
21 Defense at this point?

22 MS. GRIFFIN: Yes, your Honor, a few points.

23 THE COURT: So, are you calling it redirect?

24 MS. GRIFFIN: Yes, your Honor, I want to address new
25 things.

1 *THE COURT:* Defendant's redirect, okay.

2 *MS. GRIFFIN:* I would like to publish Defendant's 206,
3 please.

4 *THE COURT:* Is that already in evidence.

5 *MS. GRIFFIN:* Yes. Let's scroll down to the notice of
6 proposed discipline termination, please.

7 **REDIRECT EXAMINATION**

8 *BY MS. GRIFFIN:*

9 *Q.* Dr. Alperin, how was this letter sent? Look up at the top,
10 and how was this sent?

11 *MR. BENZION:* Objection, cumulative.

12 *MS. GRIFFIN:* It was not addressed fully, your Honor.

13 *THE COURT:* Overruled.

14 *THE WITNESS:* It was sent by certified mail, return
15 receipt requested, regular U.S. mail and email.

16 *BY MS. GRIFFIN:*

17 *Q.* And Dr. Alperin, did Dr. Copeland get paid for the entire
18 month of December?

19 *A.* No.

20 *Q.* I would like to publish Defendant's Exhibit 15, please,
21 bottom paragraph.

22 Dr. Alperin, was Dr. Tracy told that his memoryhole
23 blogging activity was a reportable outside activity?

24 *MR. BENZION:* Objection, very cumulative.

25 *THE COURT:* What is the question?

1 *MS. GRIFFIN:* I'm confirming he was told in
2 January 2013.

3 *MR. BENZION:* Confirming --

4 *THE COURT:* I don't want side comments.

5 *MR. BENZION:* I apologize.

6 *THE COURT:* This was covered. I will ask you to ask
7 any questions you have to ask.

8 *MS. GRIFFIN:* Sure.

9 *BY MS. GRIFFIN:*

10 Q. Dr. Alperin, do you have the collective bargaining
11 agreement in front of you?

12 A. Yes.

13 Q. Would you flip to Article 19.7?

14 A. Yes.

15 Q. Sorry, 19.6.

16 Can you please read 19.6 to the jury?

17 A. 19.6, use of university resources:

18 An employee engaging in any outside activity shall not use
19 the facilities, equipment, services of the university in
20 connection with such outside activity without prior approval of
21 the president or representative. Approval of the use of
22 university facilities, equipment or services may be conditioned
23 upon reimbursement of the use thereof.

24 Q. One final question. Publish Defendant's 40 again, please.
25 Flip to the second page.

1 Dr. Alperin, does insubordination adversely affect the
2 university's ability to carry out the mission and purposes?

3 A. Yes.

4 MS. GRIFFIN: That is all I have, your Honor.

5 THE COURT: Okay, anything further from Defense --
6 Plaintiff, rather?

7 MR. BENZION: No, your Honor.

8 THE COURT: Okay, all right. Our witness can step
9 down at this point, and because this is a break in between
10 witnesses, I will give us our mid-afternoon break at this
11 point.

12 It is ten minutes to 3:00, we will be in recess for 15
13 minutes, until five minutes after 3:00. Do not discuss the
14 case among yourselves or do any media research or speak to
15 anyone associated with the case.

16 We will see you back in 15 minutes.

17 *(Thereupon, the jury leaves the courtroom.)*

18 THE COURT: Okay, let's take a quick moment here
19 before you go on break because it is hard sidebar, there.

20 Let's pull up that exhibit that was the subject of
21 discussion so I can clearly understand each side's position,
22 briefly, and I will take a closer look at it over the break to
23 see if there is any reason to allow the Plaintiff to ask Dr.
24 Alperin about 11-B.

25 11-B is an invoice from -- to James Tracy from Rachel

1 Hollingsworth, public records specialist, April 5, 2016, and it
2 had previously been marked -- actually it hasn't been marked
3 yet. It is coming up today for the first time.

4 And we -- the Court has made a determination, at least
5 through this witness in light of her answers, that the
6 Plaintiff could not seek to admit the document through 803(6)
7 because, among other things, Dr. Alperin was not able to meet
8 the elements of A, B, C, D, E that would give the Court what it
9 would need to hear to establish that it meets 803(6) in terms
10 of a record of regularly conducted activity.

11 Then the Plaintiff, as I understand it, shifted the
12 argument to it being allowed under 801(d)(2)(A), which is a
13 statement made by the party in an individual or representative
14 capacity.

15 I have not completed all of my research yet, but
16 party, to the Court, would suggest party as in FAU. Some of
17 the cases show sometimes when referring to a party it could
18 also mean an attorney, but in this instance we have a Rachel
19 Hollingsworth, who is a public records specialist, and it seems
20 as if Plaintiff is arguing to the Court that she stands in the
21 shoes of the party, she is the party. That is how it gets in
22 under 801(d)(2)(A).

23 I am not sure if that is correct or not.

24 You haven't given me any legal authority. I would
25 need to look at that.

1 Do you have any legal authority on hand as to how
2 Rachel Hollingsworth is the party? If that were true, it would
3 seem 801(d)(2)(D) would have no meaning, you would never have
4 to show scope of employment ever.

5 I am not sure that is really what A means, and I need
6 a little more time to look at it, but the cases I looked at
7 have not revealed cases other than the party and maybe an
8 attorney.

9 So, now I look to Plaintiff's counsel for -- if you
10 can respond to that, what is your understanding of party, and
11 more importantly, not so much your understanding, but I like to
12 have the law, what legal authority you have to tell me Rachel
13 Hollingsworth can be a party. And if you are falling short on
14 that, is there any other basis on which you are seeking to have
15 it admitted?

16 MR. BENZION: I understand, your Honor, and I am
17 unable at this time to further illuminate the definition of
18 "party", though I will venture to do that after today, but we
19 also believe that we can lay a foundation or 801(d)(2)(D).
20 Perhaps we could table this conversation so I can provide the
21 law or lay a foundation for another exclusion or exception.

22 THE COURT: Okay. You understand the Court's ruling,
23 I don't see party being Rachel Hollingsworth. It flies in the
24 face of 801(d)(2)(D).

25 Again, I have been on notice that you all were

1 disagreeing about 11-B, but we never got to any illumination on
2 that, and I know with all of the filings, I don't believe
3 anything that is written or in writing has addressed this. I
4 am hearing arguments for the first time.

5 If you can show the Court why that comes in under an
6 exception, as we have acknowledged with the other issue that
7 you wanted to raise and you will put in writing, Dr. Alperin is
8 here, she will be here throughout the trial, if it is necessary
9 to call her back because you wanted to ask her about 11-B
10 because you have provided the Court with the proper legal
11 basis, then we can do so.

12 *MR. BENZION:* Understood.

13 *THE COURT:* I know there was a whole separate
14 completeness argument. I don't totally understand what the
15 argument is, quite honestly, but I think maybe that can wait
16 until we see what the exception is, or maybe let me have you
17 articulate it in a moment, so if it comes forward -- so you
18 have an invoice to James Tracy where Dr. Tracy said -- is being
19 told through this invoice, this is what you owe for a copy of
20 James Tracy's personnel file produced to media outlets and a
21 copy of James Tracy's personnel file redacted -- presumably
22 that is Rachel Hollingsworth's words.

23 *MS. GRIFFIN:* It is an invoice based on a public
24 records request.

25 *THE COURT:* Dr. Tracy made the request and he would

1 have styled it a different way. He would have called it James
2 Tracy's personnel file redacted, not produced to media outlets,
3 and produced to media outlets.

4 *MS. GRIFFIN:* Part of what Dr. Tracy's request is what
5 was produced to others, so it is all part of one big composite
6 in order to be able to understand or be a complete picture of
7 what this invoice represents.

8 *THE COURT:* Right, but he had to make a request. Is
9 that request in evidence?

10 *MS. GRIFFIN:* It is not.

11 *THE COURT:* So, he would have made a request, and this
12 would have been a response to the request, separate and apart
13 from other people making requests.

14 *MS. GRIFFIN:* Correct.

15 *THE COURT:* Is the incomplete part we don't have what
16 his request is, we don't have what he is requesting to make it
17 complete, what Rachel is responding to?

18 *MS. GRIFFIN:* Yes, along with the others. What he
19 requested is what others requested.

20 Half a dozen or more public records requests came in,
21 that is what the document was created for. He requested the
22 document in response to the public record requests. You need
23 to see those to understand the basis of that document.

24 *THE COURT:* Right, but were you going to get into the
25 content? What was your proffer in terms of what you were going

1 to ask Dr. Alperin about this document?

2 MR. BENZION: That a personnel file was produced to
3 the media.

4 THE COURT: A personnel file was produced to the
5 media?

6 MR. BENZION: Dr. Tracy's personnel file was produced
7 to the media.

8 THE COURT: It says copy of James Tracy's personnel
9 record made to the media.

10 James Tracy made a request for a personnel file
11 produced to the media, and he called it that, so you want to --
12 is it coming down to was his personnel file produced to the
13 media; is that the question you want to ask the witness?

14 MR. BENZION: Yes. On one hand they are saying it
15 wasn't, and then they say they produced the personnel file to
16 the media.

17 THE COURT: Does the Defendant take the position that
18 the university did not produce documents to the media?

19 MS. GRIFFIN: No, the university is on record that it
20 says it did include records to the media, but other public
21 records over and above his personnel file.

22 THE COURT: That was the interrogatory you read.

23 So what more -- so they have not denied they produced
24 documents, including the personnel file, to the media.

25 I am trying to see what the fight is about.

1 MR. BENZION: I think they did deny the personnel file
2 was produced in the media. They said the request was broader
3 and they gave things that are in excess of the personnel file
4 and yet there is a document that says we gave them the
5 personnel file.

6 THE COURT: You want to know whether Dr. Alperin can
7 testify that yes, the personnel file was given to the media in
8 addition to other documents; is that right?

9 MR. BENZION: The personnel file, yes.

10 MS. GRIFFIN: Dr. Alperin testified the personnel file
11 along with other documents.

12 THE COURT: Can there been a stipulation that the
13 personnel file as well as other documents relating to Dr.
14 Tracy's employment were produced to the media pursuant to the
15 public records request?

16 MR. BENZION: I will attempt to.

17 THE COURT: Is that acceptable?

18 MS. GRIFFIN: We have the interrogatory.

19 MR. CURLEY: Yes.

20 THE COURT: So, why don't you try to work out a
21 stipulation.

22 If you want to get the document in and you have a
23 legal basis to do it, move the Court to get it in. I am not
24 trying to prevent you from getting documents in. I am trying
25 to be practical about it.

1 Maybe a stipulation -- I will read the jury the
2 instruction on stipulation, and I will read the stipulation to
3 the jury. You can brief this issue if you want. You have a
4 lot on your plate, too. This might save you time.

5 Okay, we will take a break and then Dr. Coltman is
6 coming in.

7 MR. BENZION: Yes. There was another proffer I was
8 not able to raise during my questioning about the faculty
9 senate issue coming up, I had a question about that we tabled
10 for later.

11 THE COURT: Right. I thought you were going to put
12 that in writing. I already made the ruling, and you wanted to
13 revisit the ruling.

14 MR. BENZION: I was going to proffer for the record --

15 THE COURT: No. That is something I was going to
16 ask you to put in writing. Let's see if there is time at the
17 end of the day. I am not trying to make more work for you by
18 briefing, every time you brief it makes more work for us.

19 Let's see how the day goes. Right now we are fine
20 with Dr. Alperin other than the one issue with the invoice.
21 You asked everything you want to and you will try to reach a
22 stipulation.

23 MR. BENZION: Yes, other than the invoice and proffer,
24 yes.

25 THE COURT: Fair enough. We will be in recess.

1 *(Thereupon, a short recess was taken.)*

2 THE COURT: All right. Did you reach a stipulation
3 you want me to read or are you working on that?

4 MR. LEO: Not at this time. I don't think it is going
5 to come up if you are talking about the public record issue.

6 THE COURT: No. 11-B, whatever it was, 11-B. So, you
7 are not asking for the Court to read a stipulation now?

8 MR. LEO: We have not come to terms, your Honor. We
9 are not going to bring it up with this witness. You can
10 address that if there is a stipulation.

11 THE COURT: So, we can bring our jury in for the next
12 witness, then.

13 *(Thereupon, the jury returned to the courtroom).*

14 THE COURT: We have another witness. Who are you
15 calling next?

16 MR. LEO: The Plaintiff calls Heather Coltman.

17 HEATHER COLTMAN, PLAINTIFF'S WITNESS, SWORN

18 THE WITNESS: Heather Coltman, H-E-A-T-H-E-R,
19 C-O-L-T-M-A-N.

20 THE COURT: You may proceed.

21 **DIRECT EXAMINATION**

22 BY MR. LEO:

23 Q. Dr. Coltman, how long were you employed at Florida Atlantic
24 University?

25 A. For a total of, I believe, 24 years.

1 Q. And you were Professor Tracy's dean in 2013; is that
2 correct?

3 A. Yes.

4 Q. And you were his dean in 2014?

5 A. Yes.

6 Q. 2015?

7 A. Yes.

8 Q. 2016?

9 A. Yes.

10 Q. You first learned about Professor Tracy's blogging when the
11 university started receiving complaints about Professor Tracy
12 posting about Sandy Hook; is that correct?

13 A. That is correct.

14 Q. After the reports came in about Professor Tracy's blogging,
15 you held meetings with the officials at the Defendant
16 university?

17 A. Yes.

18 Q. During the meetings, you took notes?

19 A. Yes, informal notes.

20 Q. I am going to show you what is marked Plaintiff's Exhibit

21 2. You recognize this document, right?

22 A. Yes, I do.

23 Q. These are your notes you recorded during the meetings with
24 officials after you learned about Professor Tracy's blogging?

25 A. Yes.

1 Q. If you would look at each page for me and let me know when
2 you have had a chance to review the entire document.

3 A. Other than the last page, they are notes I took at the
4 meeting. The last page is slightly different.

5 Q. The first six are notes from the meetings with other
6 officials at the university?

7 A. Yes.

8 THE COURT: I will ask Dr. Coltman to pull the
9 microphone a little closer. We are taking everything down.

10 THE WITNESS: You bet, sorry.

11 THE COURT: Perfect, thanks.

12 BY MR. LEO:

13 Q. There are individuals identified in your notes, right?

14 A. Did you say there are individuals? Yes, there are
15 individuals whose names are listed on there, yes.

16 Q. And the people who are named or identified in this
17 document, those are participants in the meetings?

18 A. Not all of them.

19 Q. Who specifically are you referring to?

20 A. Well, should we look at the first one? Do you want to go
21 document by document?

22 Q. Let me ask it this way: Is there anybody who participated
23 in the meetings on the first six pages here who are not
24 identified in the notes?

25 A. No.

1 Q. What you recorded on the notes, these are statements that
2 were made during the meeting by either these individuals listed
3 or yourself?

4 A. Not necessarily. They might have been statements that
5 someone said, they might have been statements that someone said
6 someone else said. It might be a couple of key words I wanted
7 to notate. They were not necessarily quotes from anybody.

8 Q. What is recorded on the notes are statements made at the
9 meetings by officials at the meetings?

10 A. Not necessarily, some might be my thoughts.

11 Q. So, you recorded your thoughts as well?

12 A. It is very idiosyncratic with how I take notes.

13 Q. With respect to statements of others in the meetings, you
14 would have reported those as well in the notes?

15 A. I don't want to answer globally. If we could point to a
16 particular one, I could tell you if I thought that was a direct
17 quote.

18 Q. For the record, you recorded all of this, right?

19 A. Yes.

20 Q. If it was stated at the meeting, it would have been
21 something that would have been recorded here?

22 A. Not necessarily, I didn't write down everything that was
23 stated.

24 Q. What is recorded that was stated is reflected in the notes
25 in part?

1 A. Generally, perhaps in summary, not everything stated is
2 written down, and not everything written down is actually
3 stated. It is my idiosyncratic way of capturing thoughts.

4 Q. With respect to what is here, it is something you thought
5 or something somebody said at the meeting?

6 A. Most likely.

7 Q. Nothing that came from out of the meeting?

8 A. I see --

9 Q. This is during the meeting?

10 A. Yes.

11 MR. LEO: Your Honor, we would move Plaintiff's 2 in
12 evidence.

13 THE COURT: Well, there was an agreement that all but
14 certain portions -- are we talking about the redacted version?

15 MR. CURLEY: This is not the redacted version, it is
16 three and six, your Honor.

17 THE COURT: There are two pages?

18 MR. LEO: I am sorry, there is a redacted version, I
19 am going to hand you that.

20 THE COURT: What are you calling that?

21 MR. LEO: Call it 2-A, your Honor.

22 THE COURT: So, Exhibit 2-A, any objection?

23 MR. CURLEY: Well, your Honor, the redactions are
24 fine. I think your ruling was we would go statement by
25 statement and lay a foundation. Subject to that, it is fine.

1 *THE COURT:* Okay. I thought we discussed there is no
2 objection other than the redacted portions.

3 *MR. CURLEY:* The foundation issue, which I think your
4 Honor wanted outside the presence of the jury.

5 *THE COURT:* Authenticity.

6 *MR. LEO:* Your Honor, we laid the foundation who wrote
7 the statements.

8 *THE COURT:* That was the remaining issue,
9 authenticity, proffer as to the capacity of the individuals was
10 addressed and briefed and acknowledged by Defense. As I
11 recall, it was just authenticity, which was just established.

12 *MR. CURLEY:* Okay, I think we are good, your Honor.

13 *THE COURT:* Okay, 2-A is admitted without objection,
14 and it is the redacted version.

15 (Whereupon Plaintiff's Exhibit 2-A was marked for evidence.)

16 *MR. LEO:* May we publish 2-A?

17 *THE COURT:* Yes.

18 *BY MR. LEO:*

19 *Q.* If I could draw your --

20 *THE COURT:* Do you want clarification, without
21 objection?

22 *MR. CURLEY:* Yes.

23 *THE COURT:* Objection noted by Defense.

24 *MR. CURLEY:* Thank you.

25

1 BY MR. LEO:

2 Q. Maybe we could walk through the notes. I have questions
3 about particulars. On the monitor I can highlight what I am
4 asking you about.

5 A. Sure.

6 Q. With respect to the top here, these were the individuals
7 who participated in the meeting?

8 A. Yes.

9 Q. And this right here, this date, that is the date of the
10 meeting?

11 A. Yes.

12 Q. Let's start with the first one, MJ, what does that mean?

13 A. That would have referred to the president of the university
14 whose first name was Mary Jane, she called herself MJ.

15 Q. Was the president at this meeting?

16 A. No.

17 Q. Okay. When it says "no email on this" what is that?

18 A. As best I recall -- again, these are informal notes that
19 are a few years back. As best I recall, somebody indicated
20 that the president would prefer that we didn't exchange emails
21 on this topic.

22 Q. Was there a stated reason why there is no emailing on the
23 topic?

24 A. Not that I can recall, no.

25 Q. The topic you are referring to is the controversy

1 surrounding Professor Tracy's post about Sandy Hook, right?

2 A. Yes, that would be one way to describe it, yes.

3 Q. If you can scroll down a little bit here.

4 It says here "conspiracy theories when hired? No."

5 Can you explain to the jury what that means?

6 A. As best I recall, somebody asked if Dr. Tracy had been
7 examining and researching conspiracy theories at the time of
8 his hire at FAU, and as best I recall, somebody answered no,
9 that is not what he was researching at the time of his hire.

10 Q. Was anyone concerned with Professor Tracy's theory of Sandy
11 Hook at this time?

12 A. We weren't discussing his opinions about Sandy Hook, no, we
13 were discussing the response that the university had received.

14 Q. Let's go to the next note on the next page. Who is Diane?

15 A. Dr. Alperin. Diane Alperin was the Vice Provost at the
16 time.

17 Q. It says 1/9 right here. Is that the date of the meeting?

18 A. Yes, January 9th.

19 Q. This is the meeting after January 8th?

20 A. Yes.

21 Q. It says "had mtg with MJ"?

22 A. I recall that Dr. Alperin told me she had a meeting with
23 the president.

24 Q. Do you remember what day she had the meeting, or did she
25 say?

1 A. I don't know, it might have been that morning. I don't
2 know what time this was. It could have been the morning of the
3 9th or a previous date. I don't know.

4 Q. Was this meeting about Professor Tracy's blogging?

5 A. I don't know. I was not at the meeting.

6 Q. I direct your attention lower here. It says here "I
7 revised FAIR after this conversation." Do you see that?

8 A. Yes.

9 Q. Can you tell the jury what that means?

10 A. Okay, so FAIR stands for the Faculty Activity Information
11 Reporting -- Faculty Information Reporting, and it is an online
12 system where faculty lists all of their activities in a given
13 academic year. This is maintained by the chair of the
14 department or the unit head for the department for each faculty
15 member so the faculty member can see what the duties were to be
16 for that year.

17 Q. When you say you revised it, what does that mean?

18 A. So, if we go back to the previous comments, there had been
19 discussion about the content of Dr. Tracy's assignment for that
20 academic year, and it looks to me like I went back and made
21 revisions on his assignment.

22 Q. Because of his blogging?

23 A. No. No. It had to do with -- can we go back and see what
24 the earlier notes were?

25 It had to do with whether he was getting what is called

1 service credit for his work with the union, and had to do with
2 his research assignment and percentile of effort allocated to
3 research.

4 So, my best recollection is that the president had some
5 questions about the format of Dr. Tracy's assignment as it
6 appeared on the online system, and that is what we were
7 discussing, that some things were not appropriate or accurate,
8 and so, I was -- went back and revised it, it looks like.

9 Q. How did you revise it?

10 A. Do we have copies of the FAIR? I hate to recollect
11 incorrectly. Do we have copies of the assignment?

12 Q. I don't know.

13 A. If we look back at what was there before, there is a note
14 that there was -- 50 percent on his assignment had been
15 designated for his research activities, and it looks like zero
16 percent was assigned for what we call service activities.

17 My best recollection is, I went back to revise the
18 percentages. Without it in front of me, I don't remember the
19 exact percent allocations.

20 Q. Why would you revise his assignment at this time?

21 A. Um-m-m, so, at any point in the year faculty assignments
22 can be revised based on changes throughout the year. So, I
23 would imagine there was some concern that his assignment hadn't
24 been accurate because it didn't accurately reflect what he was
25 doing, and so this has been reviewed, and I presume from this

1 meeting Dr. Alperin and I discussed that.

2 Q. Underneath that it says DA. Is that Diane Alperin?

3 A. Yes.

4 Q. It says "DA called back to say no more changes"?

5 A. Right.

6 Q. Why did she say that?

7 A. This is my best guess, my best guess was that the changes
8 that I made were adequate and now reflecting his accurate
9 assignment for what he was actually doing that year.

10 Q. Is the president normally involved in assignments of
11 faculty?

12 A. No.

13 Q. So, why would you be changing the assignment after Diane
14 Alperin had the meeting about Professor Tracy?

15 A. I don't know what Diane Alperin discussed with the
16 president. All the note indicates is that Diane had a meeting
17 with the president. I believe Diane and I were looking at the
18 assignment.

19 Q. Let's go to the next one.

20 It says here "Diane & Larry." Is that Diane Alperin?

21 A. Yes.

22 Q. Who is Larry?

23 A. Larry Glick was one of the lawyers at the university's
24 general counsel office, I believe his title was associate
25 general counsel.

1 Q. 1/14, is that the date?

2 A. Yes.

3 Q. This is the third meeting you had?

4 A. Yes.

5 Q. Was there any other meetings between the 9th and the 14th,
6 do you know?

7 A. Not that I recall, no.

8 Q. Going to this right here, "obligation to meet with him," is
9 this concerning Dr. Tracy?

10 A. Yes, I believe we were discussing I had an obligation to
11 meet with him.

12 Q. Where does that obligation come from?

13 A. As his supervisor, if there are concerns about a faculty
14 member or issues related to a faculty member, it would be
15 appropriate for a supervisor to meet with a faculty member.

16 Q. Is that a rule?

17 A. I don't know if it is a hard and fast rule, it is certainly
18 the best practice.

19 Q. It is important to keep open communication with a faculty
20 member?

21 A. There is a hierarchy, you don't skip out an academic head,
22 there is an obligation for someone to meet with him. I don't
23 know if I met myself, I don't know that for sure.

24 Q. I would like to ask you about this one.

25 It says here "objectives". Do you see that?

1 A. Yes, I do.

2 Q. That is objectives, right?

3 A. Yes, that says objectives.

4 Q. Whose objectives were they?

5 A. Again, the best I can remember, it looks like we are
6 discussing that I need to or will be having a meeting with Dr.
7 Tracy and that there are some objectives to that meeting.

8 Q. And it says 1 right here. Does that mean that is the first
9 objective?

10 A. It looks like it, yes.

11 Q. It says here "explore potential misconduct"?

12 A. Right.

13 Q. And then "blog".

14 So, is the first objective -- at least that was discussed
15 in this meeting, to explore misconduct for Professor Tracy's
16 blog?

17 A. That is what it looks like from the notes I can remember.

18 Q. Is that standard?

19 A. Is what standard?

20 Q. For the administration to be exploring this conduct for
21 blogging activities after there are some things about it?

22 A. I think it would be appropriate for the administration to
23 explore potential misconduct no matter what it is. I don't
24 think blog means the misconduct was necessarily the blog, that
25 is the second line of notes, but it doesn't mean it is the same

1 exact phrase.

2 Does that make sense? I am trying to interpret the
3 idiosyncratic notes from a few years back. I wouldn't think
4 that is connected.

5 Q. These are your notes, explain as best you can.

6 A. As best I can recall, it is for potential misconduct. It
7 refers to was there a disclaimer on the blog. The disclaimer
8 was required by the collective bargaining agreement as we
9 understood it, so to not have a disclaimer would be a violation
10 of the CBA which potentially could be misconduct. The best I
11 can understand my notes, that is what we were discussing.

12 Q. I am going to show you what is marked Plaintiff's 87, it is
13 already in evidence.

14 When you say the collective bargaining agreement, is that
15 87, what you are referring to?

16 A. Yes.

17 Q. You said the collective bargaining agreement requires a
18 disclaimer on a blog. Could you tell us where that is stated?

19 A. It is more complex in nuance than that. There are a number
20 of articles in the collective bargaining agreement.

21 If you look -- well, let's go first --

22 Q. For the record, tell us which page the article --

23 A. Let me make sure I am showing the right page. Give me a
24 moment.

25 Q. Take your time.

1 A. If you look at page 12, Article 5, Article 5 is academic
2 freedom and responsibility.

3 Q. 5.3(d)?

4 A. Yes.

5 Q. Is that the one that says when speaking, faculty member has
6 to make clear they are not speaking on behalf of the
7 university?

8 A. Right. That is not the exact quote, but yes.

9 Q. Article 5 doesn't say if you have a blog you need to
10 disclaim it, does it?

11 A. It doesn't use the word disclaimer. I need time to go
12 through the CBA and find the exact spots I am referencing.
13 Again, it has been awhile.

14 Q. With respect to blogging, is there a policy at Florida
15 Atlantic University with respect to blogging?

16 A. No.

17 Q. Let's stick with the notes, we can come back to that.
18 Let's scroll down a little bit here. Next page.

19 "JT not going to stop publishing." Is JT James Tracy?

20 A. Yes.

21 Q. "Read his stuff." Did I say that right?

22 A. That's right.

23 Q. Did I read that right?

24 A. Yes.

25 Q. This note is referring to Professor Tracy continuing to

1 blog?

2 A. Again, in my way of making notes someone said -- we are
3 discussing the fact that -- we assume that James Tracy is not
4 going to stop publishing. He is a researcher and faculty
5 member, it would be unusual for him to stop publishing, and it
6 looks like read his stuff or read his stuff, somebody read his
7 stuff or might want to read his stuff. It is difficult to say
8 what I exactly meant when I made those little notes.

9 Q. Understood. Here is one I need to ask you about.

10 It says "First Amendment - find winning metaphors."

11 Can you explain that?

12 A. I actually don't really remember what that means.

13 It looks like we were discussing the First Amendment which
14 would provide for freedom of expression, and on the next line,
15 "find winning metaphors," I don't know if somebody said that, I
16 don't know if that is a summary of something somebody else
17 recalled.

18 I really can't remember what that meant.

19 Q. On the page before that it was dated January 14, 2013,
20 right?

21 A. Yes, the page before is January 14th.

22 Q. I notice this note didn't have a date on it. Is this a
23 continuation of that set of notes?

24 A. I am assuming so, yes. I don't know for sure, but I would
25 assume that.

1 Q. This page doesn't have any lines, much like the page before
2 it. All the other pages have lines.

3 A. Lord, I wish I know how my scribbles were going to be
4 examined so closely. The line after First Amendment might be a
5 dash, a hyphen.

6 Q. I am referring to the background, this is a blank page you
7 are writing on. The other notes have lines like a legal pad.

8 A. Oh, you are talking about lines on the page?

9 Q. Yes.

10 A. Yes, this looks like it was a blank piece of paper.

11 Q. And the note prior to this, 1/14, says it was Diane and
12 Larry, I believe?

13 A. Correct.

14 Q. So, this was a meeting with you, Diane Alperin and the FAU
15 attorney?

16 A. Yes.

17 Q. Is it your testimony you didn't say "First Amendment - find
18 winning metaphors"?

19 A. I am almost a hundred percent sure I didn't say that. I
20 don't recall saying it, I don't even know what it means.

21 Q. I am trying to figure out who said it. That leaves two
22 other people. Was it Diane Alperin or the FAU lawyer?

23 A. I don't remember, I really don't remember.

24 Q. Did you think about it, First Amendment - find winning
25 metaphors, at that time?

1 A. We were discussing the First Amendment, the importance of
2 having freedom of expression. I don't know that the words
3 under that relate to it.

4 These were not formal notes, it wasn't minutes of the
5 meeting, they are not a summary of the meeting, these are my
6 handwriting idiosyncratic type.

7 Q. Did anyone define the First Amendment?

8 A. If they did, I don't know.

9 Q. Let's go to this one, "not academic freedom because this is
10 not academic."

11 Did that read that right?

12 A. Yes.

13 Q. "Hobby is very different from work at a university." That
14 is referring to Professor Tracy's blogging?

15 A. It might have. I think we were looking at the articles
16 that had created this reaction from the public, and we were
17 looking at part of his academic research, are they not part of
18 his academic research, does this meet scholarly standards for
19 academic research. We weren't making formal conclusions, this
20 is what was happening at the time.

21 It looks like we were thinking these aren't academic
22 articles.

23 Q. Because they weren't?

24 A. At the time, that is what we were writing, and it looks
25 like if you have a hobby, it is different from your work,

1 meaning your professional work at the university. It is
2 difficult to claim these are decision points or clear
3 statements, these are stream of consciousness thoughts.

4 Q. If I could draw your attention to the bottom of the next
5 page.

6 "A blog can look like" -- is that "academic work?"

7 A. Yes.

8 Q. "But we have procedures and views at many levels, vetting,
9 not appearance of schol" --

10 A. Scholarship.

11 Q. "But is real scholarship."

12 That is what academics do at universities, right?

13 A. Yes, that refers to within the academic specialties there
14 are standards and procedures determining the quality of the
15 piece of research or scholarship, so I was making notes that we
16 have, we being departments, academic disciplines, we have
17 procedures and reviews of the quality and impact of research.

18 Q. On January 4, 2013, you agreed that a blog is an academic
19 work, right?

20 A. No, I said a blog can look like academic work. This is not
21 reflecting an agreement we made or anybody else's thoughts,
22 these are my informal scribbles.

23 Q. With respect to what you wrote here, you wrote "blog can
24 look like academic work, but" -- and then you explain why it is
25 not, right?

1 A. At that point, that looks like what we were discussing and
2 perhaps what I thought at that point in the meeting, yes.

3 Q. Would you agree if this is a true statement, a blog can
4 look like academic, but it is not?

5 A. It could be true, yes.

6 Q. It needs to have vetting, right?

7 A. The blog --

8 Q. To be academic, a blog has to be vetted, has to have peer
9 review to be considered an academic work?

10 A. That would be up to the particular disciplinary standards,
11 whatever that department might consider adequate for research.

12 Q. When an academic or a faculty member at the university is
13 blogging, that doesn't make it academic just because it is
14 blogging, right?

15 A. That is true. If you were an academic in philosophy and
16 blogging about dog trails in Boca, that is right, that wouldn't
17 be an academic article.

18 Q. Based on what you just said, would that have to be reported
19 to the university as a professional activity?

20 A. A blog about the dog trails in Boca if you were in
21 philosophy, no.

22 Q. How about a history professor who blogs about history?

23 A. Well, my understanding is --

24 MR. CURLEY: I object to the hypotheticals. If we
25 stick to the facts of the case, that would be good.

1 *THE COURT:* Overruled.

2 *BY MR. LEO:*

3 *Q.* You can answer.

4 *A.* My understanding is that your professional expertise and
5 training and academic department you reside in is your area of
6 specialization. If you are going to blog or pursue activities
7 that are outside the university, you need to fill out an
8 activities form.

9 If it is not, sure, you discuss that with your supervisor
10 and you verify if there is any conflict perhaps of interest, of
11 time, and then the supervisor and you would agree, okay, this
12 is a conflict or it is not a conflict.

13 Typically, if you are blogging or doing activities related
14 to your area of expertise, it is required to fill out an
15 outside activity form.

16 *Q.* What you just said is not in the guidelines that you
17 provided to faculty members, is it?

18 *MR. CURLEY:* Objection, best evidence.

19 *MR. LEO:* That is not best evidence.

20 *THE COURT:* Why don't you be clear with the witness.
21 when you say not in the guideline, do you want to refer her to
22 a guideline?

23 *MR. LEO:* There are a lot of guidelines and documents.

24 *THE COURT:* Maybe rephrase the question so the witness
25 is clear what the question is and the answer is directed to

1 what you want her to answer.

2 BY MR. LEO:

3 Q. It sounded like you provided a rule with respect to a
4 faculty member who is engaged in a blog that is in their realm
5 of discipline. Is that what you were explaining?

6 A. So, there is a lot of trust among the faculty and
7 administrators when it comes to this. It is up to the faculty
8 to say, hey, I have this outside activity, I will fill out the
9 form and report it. The supervisor reviews it, and they say,
10 okay, glad you reported it, so they sign it. Or the supervisor
11 may say this is conflicting with X, Y, Z with the university,
12 let's go back and discuss it.

13 The purpose of this provision is having this collaborative
14 discussion. I think Article 19 does discuss this.

15 Q. All right. Let's pull it up.

16 Please tell the jury where Article 19 addresses that.

17 A. 19.4.

18 Q. Right here?

19 A. Yes, yes. Sorry.

20 Q. And where does it say that if you are writing a blog that
21 is within the realm of your discipline, that you need to report
22 that?

23 A. It doesn't say that.

24 Q. I read, an employee proposing to engage in outside activity
25 shall -- it says here the report shall include where applicable

1 the name of the employer or recipient of services, funding
2 source, activities, location of activity shall be confirmed.

3 Do you see that?

4 A. Yes.

5 Q. Isn't this talking about employment activity?

6 A. It is under the heading reportable outside activity. It
7 could be compensated, it could be uncompensated.

8 Q. Yes, let's talk about that. Scroll up.

9 You are referring to this, this one right here?

10 (Indicating.)

11 A. Correct.

12 Q. Let's talk about compensated.

13 The university doesn't provide a definition of compensated
14 in this article, does it?

15 A. Not that I can recall. Do you want me to look at the whole
16 article?

17 Q. No, I want to focus --

18 A. I don't know where it defines compensated in the article.

19 Q. Compensated means receiving money for doing something,
20 right?

21 A. To the best of my knowledge, yes.

22 Q. Quid pro quo?

23 A. It means getting paid for something.

24 Q. Receiving a gift, that wouldn't be compensation, would it?

25 A. I am not a lawyer, I don't want to make those guesses, is a

1 gift compensation in the legal world.

2 Q. I am asking what it means at Florida Atlantic University.

3 A. If I did an outside activity and received a gift, I would
4 report it just to be sure.

5 Q. I didn't say anything about outside activity. You receive
6 a gift, someone gives you a birthday present, let's say. Is
7 that compensation?

8 MR. CURLEY: This is a hypothetical not based on any
9 facts in this case.

10 THE COURT: I'll allow A few hypotheticals, given we
11 are having extensive testimony with a number of witnesses. It
12 is important we try to stay as much to the facts of this case
13 in all questioning.

14 MR. LEO: Your Honor, the definition of the words that
15 are in this policy are certainly not irrelevant, but material
16 to this case.

17 THE COURT: I didn't say they weren't. Then just ask
18 the witness what is the meaning of this language, and then she
19 will answer.

20 MR. LEO: Okay.

21 THE COURT: Because, you know, the case doesn't
22 involve birthday gifts. The more we get off tangent, it just
23 becomes longer.

24 BY MR. LEO:

25 Q. Let's talk about this right here. (Indicating.) It says

1 "professional practice, consulting, teaching or research." Do
2 you see that?

3 A. Yes.

4 Q. Does this mean professional practice, professional
5 consulting, professional teaching or professional research, or
6 is it supposed to be read professional practice, skip that, and
7 look at these separately?

8 A. I would lean towards doing it the second way, but I didn't
9 write this CBA, I wasn't involved in the drafting of it. It
10 could be something different, but I would lean toward the
11 second one.

12 Q. There is no explanation for that in here, is there?

13 A. Again, if you want me to look through the whole thing to
14 verify it.

15 Q. You have the CBA next to you, it is just two pages, right?

16 (Pause.)

17 *THE COURT:* Counsel, if you know there is no
18 explanation of it, do not have the witness spend time reading
19 it now.

20 If there is a particular question, or direct her to a
21 particular point, in the interest of time that might be more
22 expeditious.

23 I know the document has been covered by a number of
24 witnesses and it is in evidence.

25 *MR. LEO:* Yes, your Honor, I am trying to understand

1 the dean's understanding of the policy that was used to
2 discipline Professor Tracy.

3 *THE COURT:* Go ahead and ask her exactly those
4 questions.

5 *MR. CURLEY:* Your Honor, as we all know, she is not
6 with the university anymore, reference to her as the dean is
7 inaccurate.

8 *THE COURT:* Former dean.

9 *MR. LEO:* Former dean. I apologize.

10 *THE COURT:* What do you want to ask former Dean
11 Coltman so we can move things along?

12 *MR. LEO:* My question was how this is interpreted by
13 Dean Coltman or former Dean Coltman.

14 *THE COURT:* How 19.2(a) is?

15 *MR. LEO:* Yes.

16 *THE COURT:* Why don't we have her answer that
17 question. How do you interpret 19.2(a)?

18 *THE WITNESS:* So, I interpret 19.2(a) as some
19 conversation where the faculty initiates a conversation with
20 their chair saying here is this activity, I believe it falls
21 into professional practice or perhaps consulting, teaching or
22 research, I am going to disclose it, and then they can see if
23 there is any conflict or if they are in agreement.

24 Depending on the discipline, department, depending on
25 the activity, it would be the faculty's responsibility to first

1 disclose it and bring back questions to their supervisor. I
2 can give you examples if you like.

3 Q. No, I am more focused on Article 19. I am hearing a lot of
4 words not there.

5 *THE COURT:* Just ask the questions, do not testify.

6 *BY MR. LEO:*

7 Q. What you just stated is not in Article 19, that it depends
8 on the discipline or anything?

9 A. Correct, what I just said is not written down in Article
10 19.

11 Q. All right. Let's move on.

12 A. Do you want me to keep the CBA out?

13 Q. Go back to your notes.

14 A. Okay.

15 Q. These notes were created before your meeting with Professor
16 Tracy in January 2013?

17 A. Yes.

18 Q. In the meeting with Professor Tracy, did you say this to
19 him, that his blog was not academic?

20 A. Boy, I don't remember exactly word for word everything that
21 was said. There is a summary of the meeting, I don't believe I
22 said that to him.

23 Q. I counted four meetings before your meeting with Professor
24 Tracy in January 2013. Is that accurate?

25 A. Yes, that is accurate.

1 Q. I will show you what is marked as Plaintiffs 95-C. Let me
2 turn your attention to number 19.

3 THE COURT: Plaintiff's 95-C?

4 MR. LEO: Yes, your Honor. With respect to this, I
5 would like to publish number 19.

6 THE COURT: Any objection?

7 MR. CURLEY: No objection, your Honor. These are
8 interrogatory answers.

9 MR. LEO: This is answers to interrogatories.

10 THE COURT: Ladies and gentlemen, you will hear
11 answers that Dean Coltman gave -- responses she gave?

12 MR. LEO: Yes.

13 THE COURT: -- former Dean Coltman gave to questions
14 the Plaintiff submitted. The questions are called
15 interrogatories, you heard them before. Before the trial,
16 former Dean Coltman gave the answers under oath. You must
17 consider the answers as though she gave the answers on the
18 witness stand.

19 MR. LEO: May we publish, your Honor?

20 THE COURT: Yes.

21 BY MR. LEO:

22 Q. Dr. Coltman, you were asked to describe when and how you
23 first learned about the Plaintiff's personal blogging, and set
24 forth any and all actions undertaken in response to Plaintiff's
25 blogging by you, or on your behalf, or on the Defendant

1 university's behalf.

2 Do you remember that question?

3 A. That is question number 19?

4 Q. Yes.

5 A. Yes, I see that, yes.

6 Q. And you see on the last page of the interrogatories here,
7 you signed this, right?

8 A. Yes, I did. Yes, I did.

9 Q. We are having technical issues here. There we go.

10 I want to draw your attention to the answer to the question
11 I read, "After learning of Plaintiff's memoryhole blog, Coltman
12 met with Plaintiff on or about January 18, 2013 to discuss the
13 Plaintiff's obligations under Article 5.3(d) of the collective
14 bargaining agreement which required that when speaking on any
15 matter of public interest, a faculty member shall make clear
16 when comments represent personal opinions and when they
17 represent official university positions." And it says
18 subsequently -- I am sorry, "Plaintiff subsequently received a
19 Notice of Discipline."

20 Do you see that?

21 A. Yes, I do.

22 Q. You only mentioned the January 18 meeting; am I right?

23 A. Correct.

24 Q. You didn't mention the four meetings you had before
25 January 18, did you?

1 A. They are not mentioned here, you are right.

2 Q. Is there a reason for that?

3 A. To the best of my understanding, the paragraph ahead --
4 ahead of that says that an action is defined as the fact or
5 process of doing something. I believe when I answered this my
6 understanding of a meeting -- that was a discussion, it was not
7 meeting the standard of doing something to the extent that
8 meeting with the Plaintiff would be. That is the best of my
9 recollection.

10 Q. The question was any and all actions in response to the
11 Plaintiff's blogging by you, right?

12 A. Yes, that is what it says. There was certainly no attempt
13 to hide the other meetings. So, I am not quite sure, if those
14 meetings got left out, then they got left out, but again, an
15 action is defined as a fact or process of doing something to
16 achieve an aim. The aim was to bring to the Plaintiff's
17 attention his obligations under the CBA.

18 Q. Your answer doesn't say the Plaintiff's blog as being a
19 reportable outside activity, does it?

20 A. No, it doesn't.

21 Q. After your meeting on January 18, 2013, you asked the
22 Plaintiff, Professor Tracy, to submit outside employment forms
23 for his blog; isn't that true?

24 A. Could we look at the summary to make sure I remember it
25 correctly?

1 Q. Sure.

2 A. Are we done with the notes?

3 Q. For now.

4 I will show you Plaintiff's 1.

5 A. Thank you.

6 Q. We'll publish 1 to show the jury what we are looking at.

7 This was something you prepared after the meeting?

8 A. Yes, it is a summary of the meeting.

9 Q. I draw your attention to the last paragraph here.

10 You asked Professor Tracy to submit the report of outside
11 employment activity form for his blog, right?

12 A. It looks like we were asking him to fill out the reports of
13 outside employment activity forms, yes, for the memoryhole blog
14 or whatever activities he might been engaged in.

15 Q. What was Professor Tracy's response to that?

16 A. Do you mean after he received the summary?

17 Q. Sure.

18 A. Um-m-m, that was January 28th, correct, when I wrote this
19 summary.

20 I did not receive any reports of outside activity.

21 Q. I show you what is marked Plaintiff's 6 which is already in
22 evidence.

23 MR. LEO: May I publish 6?

24 THE COURT: If it is already in, yes.

25

1 BY MR. LEO:

2 Q. Dr. Coltman, Plaintiff's 6 is Professor Tracy's response to
3 that memorandum you sent him on January 28th, right?

4 A. Yes.

5 Q. Dr. Tracy said no to a request -- you were asking for forms
6 for his blogging, right?

7 A. He doesn't say no there, but he does talk about the fact
8 that he does not believe the forms are required.

9 Q. Right. He said the form is not required because my
10 activities on the social media, such as a personal blog, do not
11 constitute professional practice and thus do not fall within
12 the CBA's definition of reportable outside activity, right?

13 A. Are you asking me if that is what it says? Yes, that is
14 what it says.

15 Q. He wrote that to you?

16 A. Yes.

17 Q. Was that insubordination?

18 A. He had not said no, I am not going to fill them out. He
19 said the form is not required, so he was expressing his opinion
20 and disagreement with what I asked him to do.

21 Q. Was it insubordination?

22 A. It is certainly concerning when you have an employee that
23 you are asking him to do something specifically and they are
24 telling you no, I don't need to do it.

25 Q. But to answer my question, was it insubordination?

1 A. For a legal definition of insubordination, I would want to
2 get advice before I answer that. Yeah, typically, if a faculty
3 member says nope, I am not going to do that, that is one word
4 for insubordination, one word would be he is refusing, one
5 word, he is not cooperating, one word would be he is in
6 violation of the CBA. It depends on how strong you want your
7 language to be. Insubordination would be one word that you
8 could use.

9 Q. Professor Tracey was not disciplined for insubordination
10 when he was --

11 A. You are asking me if he wasn't disciplined for what?

12 Q. I am saying Professor Tracey was not disciplined for
13 insubordination in February 2013, was he?

14 A. In February 2013, when he sent me the memo, he was not
15 disciplined in February, I believe the Notice of Discipline
16 came in March, I believe. I don't remember the exact date.

17 Q. March 28th; is that right?

18 I show you Plaintiff's 8. Does that refresh your
19 recollection?

20 A. Yes, it was March when he received a Notice of Discipline.

21 Q. Are you saying Professor Tracey was disciplined in
22 March 2013, for not reporting the blog?

23 A. So, the discipline on March 28th talks about disclaimers,
24 it talks about the obligations that are outlined in the CBA,
25 refreshes his memory as to what we discussed when we met. What

1 we were focusing on was getting the disclaimers thoroughly and
2 appropriately posted on the memoryhole blog.

3 I had assumed he would fill out the outside activity report
4 since that was a requirement. The discipline did not talk
5 about outside activity forms, it talked about the disclaimers.

6 Q. Right. My question is, was he disciplined for
7 insubordination in March 2013?

8 A. May I read this?

9 Q. Sure.

10 A. To refresh my memory.

11 Q. Please.

12 A. The word "insubordination" does not appear in the memo,
13 this is language that references that he ignored his
14 obligations and my directives.

15 Q. Do you agree this is two months after he said no to turning
16 in a form for his blog? Right?

17 A. Roughly, yes, roughly two months.

18 Q. And before March 28, 2013, any time between February 2nd,
19 2013, when he sent you his response saying he wasn't going to
20 return the form for the blog, he wasn't disciplined, was he,
21 for not turning in the form?

22 A. Correct.

23 Q. Is there a reason for that?

24 A. There was a lot going on, okay.

25 The response from the media, response from the public

1 continued, it did not die down. We were really focused on the
2 disclaimer because there was this perception in the public that
3 FAU was sponsoring the research of his, and we wanted to make
4 sure the disclaimers were appropriately posted as to the
5 policy. That is what we were focusing on.

6 The activity forms is sort of an honor system, he knew they
7 were required, I told him they were required. He said he
8 didn't believe they were required. They were required. We
9 weren't focusing on that at the time.

10 Q. So, a moment ago you said that was insubordination?

11 A. The word "insubordination" does not appear in the memo.

12 Q. Professor Tracy saying I am not turning in the form for my
13 blog, February 2nd, 2013, it was your testimony that was
14 insubordination?

15 A. What I would like to say, one could characterize that as
16 insubordination. That is a very strong word to use, it could
17 be characterized as insubordination. It could be an ongoing
18 disagreement of what was required and we needed to work that
19 out. We were focusing on disclaimers at that point.

20 Q. If I could direct your attention to the January 14 note one
21 more time.

22 He wasn't disciplined because the blog is not academic,
23 right, in 2013?

24 A. So, again, I have a hard time using these scribbled very
25 informal notes to justify decisions that were made formally

1 weeks later. I don't think it is -- I don't want to rely on my
2 handwritten notes to cover the extent of everything that was
3 discussed and debated.

4 That is what the notes say, but it doesn't follow that
5 these notes informed our discussions for the following six
6 weeks. These are informal notes.

7 Q. I am more focused on why he wasn't disciplined for
8 insubordination when he said no. My question was, is that
9 because the blog is not academic, hobby is different from work
10 in a university, a blog could look like academic work, we have
11 procedures at various levels, vetting?

12 MR. CURLEY: I object to the question, your Honor.

13 THE COURT: Overruled.

14 BY MR. LEO:

15 Q. Is that what it was?

16 A. We were focusing on the disclaimer, we were not focusing on
17 the activity report. We had a lot of things we had to deal
18 with. We were trying to get the disclaimers on the memoryhole
19 blog.

20 Q. Do you agree by not disciplining Professor Tracy when you
21 he said no, you would make him think that is right?

22 MR. CURLEY: Objection, speculation.

23 THE COURT: Was there an objection?

24 MR. CURLEY: Objection, speculation.

25 THE COURT: Sustained as to what this witness would

1 know about what Dr. Tracy would be thinking.

2 BY MR. LEO:

3 Q. By not disciplining Professor Tracy for not reporting his
4 blog at that time, was the university acquiescing to Professor
5 Tracy's position with respect to whether or not the blog was
6 reportable?

7 A. I can't speak to the whole university, I didn't feel I was
8 acquiescing. I thought there was a disagreement, it didn't
9 make sense to me, he had been president of the union, he signed
10 the former CBA when this is a requirement. I figured we would
11 work through this. I was focusing on the disclaimers. I don't
12 know if I can convey how intense the work on these was, the
13 emails coming in, reporters showing up on campus, disruption to
14 the normal campus.

15 I figured the outside activity forms, we would get to them,
16 let's get the disclaimer forms posted.

17 Q. With respect to the forms, he didn't turn them in for his
18 blog in 2013, did he?

19 A. That is correct, he did not.

20 Q. He didn't turn in disclaimer forms for the entire year,
21 right?

22 A. Later, that is what I determined, yes.

23 Q. You never told Professor Tracy he was insubordinate in
24 2013, did you?

25 A. No, I didn't.

1 Q. You didn't say, Professor Tracy, you are in violation of
2 Article 19, you didn't turn in your forms any time in 2013,
3 right?

4 A. That is correct.

5 Q. So, how was he supposed to know that you expected him to if
6 you didn't say it?

7 A. Because he was a tenured faculty member, president of the
8 union, and he was very well aware of policies. There were
9 reminders throughout the year from faculty leaders, this wasn't
10 a surprise. He was not ignorant to this policy and
11 requirement.

12 Q. When you say there were reminders, there were reminders to
13 the union that blogging is a reportable activity? Are you
14 saying that?

15 A. No.

16 Q. In 2013, was there ever a reminder that was sent to faculty
17 members at FAU that blogging, social media, Twitter, Facebook,
18 the like, is a reportable activity?

19 A. I am not aware of one. I don't know of one.

20 Q. In February 2014, was there one?

21 A. Not that I recall.

22 Q. Are you aware of any reminder from the union or school or
23 anybody to Professor Tracy that blogging, well, that should be
24 on a report of outside employment form?

25 A. The conversation, again, that Diane Alperin had in January,

1 we told him you need to fill out the forms. The summary of the
2 meeting, I reminded him again and reiterated he needed to fill
3 out the forms. Yes, he did receive those instructions.

4 Q. When you say that he needed to fill out the forms, that is
5 not true, is it?

6 A. Um-m-m, if my supervisor says you need to fill this out as
7 part of your job responsibilities, I would say that was true, I
8 needed to fill it out.

9 MR. LEO: At this time we would like to publish
10 request for admission number one, Plaintiff's 96.

11 THE COURT: Any objection?

12 MR. CURLEY: Looks okay, no objection, your Honor.

13 THE COURT: Okay, so this is -- let me hold this up.
14 Which one?

15 MR. LEO: Plaintiff's 96, the first.

16 THE COURT: The first one?

17 MR. LEO: Yes.

18 THE COURT: This was answered by the witness?

19 MR. CURLEY: By the university, your Honor.

20 THE COURT: By the university.

21 Okay, there is no particular instruction on it.

22 Ladies and gentlemen, the next exhibit that will be published,
23 it is --

24 MR. LEO: I am going to read it. We are having
25 trouble here, I want to speed this up.

1 *THE COURT:* I am explaining to the jury what it is.
2 It is not being admitted into evidence, it is not an
3 interrogatory, it is part of the same type of procedure that
4 occurred before the trial, during the course of litigation, it
5 is called a request for admissions. And so, counsel is going
6 to read one of those requests that was made and one of the
7 responses that was made in the course of what is called the
8 discovery process.

9 You may publish.

10 *BY MR. LEO:*

11 *Q.* The question was, and this was directed to the university,
12 "1. Admit that not all FAU faculty members have submitted
13 forms entitled Report of Outside Employment or Professional
14 Activity."

15 "Response: Defendant university admits this request to the
16 extent that not all faculty members are required to submit
17 forms entitled Report of Outside Employment or Professional
18 Activity for FAU employees because not all faculty members
19 engage in reportable outside activity, and all faculty members
20 have checked the box affirming acknowledgment of the conflict
21 of interest/outside activity policy."

22 Did I read number 1, the response?

23 *A.* Yes, yes.

24 *Q.* It says not all faculty are required to submit forms
25 entitled Report of Outside Employment or Professional Activity?

1 A. Yes, I see that.

2 Q. You agree all faculty don't have to?

3 A. If they don't do any outside activity, they do not have to
4 fill out the form.

5 Q. And on the monitor, you see that, you said you should. You
6 didn't say must?

7 A. Correct.

8 Q. You didn't say you are required to?

9 A. The form is required, you should complete this required
10 form. One could infer that is a requirement.

11 Q. You just heard the university's admission not all forms are
12 required?

13 A. I thought you wanted me to talk about what my sentence
14 meant.

15 Q. You didn't tell Professor Tracy he must, you said should,
16 right?

17 A. That is what it says.

18 Q. And the rule at the university with respect to these forms,
19 if you are not engaging in outside activities, reportable
20 outside activities, you don't got to submit a form, right?

21 A. We met with Dr. Tracy and we discussed the fact that
22 memoryhole blog fit the definition of an outside activity.

23 Q. Right, but you didn't --

24 *THE COURT:* Let her finish the answer.

25 *THE WITNESS:* As a consequence of that, I wrote in the

1 summary memo you should complete this form, and that is a
2 normal conclusion to make, therefore, this is now a form you
3 need to fill out for this activity.

4 *BY MR. LEO:*

5 *Q.* He didn't turn it in, did he?

6 *A.* No, he didn't.

7 *Q.* In fact, he said this isn't a reportable outside activity,
8 right?

9 *A.* That is what he said.

10 *Q.* And you didn't discipline him after he said that?

11 *A.* Correct, I did not.

12 *Q.* So, you could see why professor Tracy didn't think that his
13 unscholarly work on his personal blog, which is not subject to
14 peer review and doesn't meet professional academic standards,
15 was required to be put on a form of outside employment?

16 *MR. CURLEY:* Objection, argumentative and compound.

17 *THE COURT:* Well, it is also calling upon what Dr.
18 Tracy would think, and that would be speculative, so I will
19 sustain. If you want to rephrase the question -- and it is
20 compound.

21 *MR. LEO:* I will ask it a different way, your Honor.

22 *BY MR. LEO:*

23 *Q.* Why wasn't Professor Tracy punished and disciplined in
24 2013, for insubordination?

25 *A.* Um-m-m, in 2013, throughout that spring semester we were

1 dealing with a lot of things related to the public response to
2 his writings. Our primary concern was getting the appropriate
3 disclaimers posted, that is what we were focused on.

4 Q. Have you ever answered that question differently before?

5 A. I am going to guess I have, I am going to guess you're
6 pulling something out that shows I answered differently.

7 Q. Do you remember a deposition in this case?

8 A. Yes, I do.

9 Q. You were there?

10 A. Yes, I was at my deposition, the last I recall, yes.

11 Q. You had these lawyers there?

12 A. Yes.

13 Q. I was there?

14 A. I believe so.

15 Q. For the record, I will show you Volume 2 of the Heather
16 Coltman deposition, May 4, 2017, page 257, lines eight through
17 11.

18 Did you read it?

19 A. Yes.

20 Q. What was your answer?

21 MR. CURLEY: Page and number.

22 MR. LEO: 257, lines eight through 11.

23 BY MR. LEO:

24 Q. I asked you the same question, didn't I?

25 MR. CURLEY: Could I approach?

1 MR. LEO: I will show you my copy.

2 MR. CURLEY: Mine does not say what he said.

3 BY MR. LEO:

4 Q. When I asked you why wasn't Professor Tracy punished and
5 disciplined in 2013, what was your answer?

6 A. At that time I answered "I don't know."

7 Q. Okay. Today it seems you have a different answer?

8 A. So --

9 MR. CURLEY: I object to this, your Honor, it is not
10 inconsistent.

11 THE COURT: Well, I'm not looking at it. If you want
12 to --

13 MR. LEO: Would you like to see it?

14 THE COURT: Is there an objection to have the witness
15 say what she had to say in the deposition?

16 MR. CURLEY: None, your Honor.

17 THE COURT: Point to the line you would like her to
18 read.

19 BY MR. LEO:

20 Q. If you would read the question and answer?

21 A. The question was: "Then why wasn't Professor Tracy
22 punished and disciplined in 2013 for insubordination?" The
23 answer was, "I don't know."

24 Q. A moment ago I asked you that same question and you had an
25 explanation, right?

1 A. It was an explanation, as best I can recall, of what was
2 happening at that time, yes.

3 Q. Which one was it, that you don't know, or that there was a
4 lot going on at the university and that is why?

5 A. So, yeah, there was a lot going on at the university, we
6 were focused on the disclaimer, we were not focused on trying
7 to discipline anybody at that point. We were dealing with this
8 huge amount of communications from very unhappy, very angry
9 people, and we wanted to focus on the disclaimer. It is not
10 inconsistent that I said I don't know why he wasn't
11 disciplined, perhaps I do know.

12 Perhaps we were focused on other things and we trusted we
13 would work that out, we'd get to the point where we would
14 collaborate and get together, and I trusted that he understood
15 this. He always understood this, he participated in the
16 previous CBA and was well aware of the policy. That was not
17 our focus at the time, we were focused on disclaimers.

18 Q. Final answer?

19 MR. CURLEY: I object, your Honor.

20 THE COURT: Sustained.

21 MR. LEO: I will move on.

22 THE COURT: I will have the jury disregard the last
23 statement by counsel.

24 BY MR. LEO:

25 Q. Would you say social media is to be reported on special

1 employment outside activity forms or is not?

2 A. Case-by-case basis.

3 Q. Do you remember giving a different answer before?

4 A. I don't remember my answer at the deposition.

5 Q. For the record, I will show you Volume 1 of the same
6 deposition, page 64 of 174.

7 Why don't you read the question and answer for the jury.

8 MR. CURLEY: Your Honor, we need to approach.

9 THE COURT: Right now the answer was simply,
10 case-by-case basis, and then, do you remember giving a
11 different answer before, and the witness said, I don't
12 remember. Right now, nothing is being shown to the jury, this
13 was presented to her to refresh her recollection.

14 Let me wait and see what the next question will be to
15 see if we need a sidebar.

16 What were you going to ask?

17 MR. LEO: I was going to have her read her answer.

18 THE COURT: Refreshing recollection doesn't permit the
19 witness to read. You can ask her if her recollection is
20 refreshed, you may ask that.

21 BY MR. LEO:

22 Q. Does this refresh your recollection as to the answer to
23 that question previously?

24 A. Um-m-m, yes, my recollection is refreshed.

25 Q. And what was the answer --

1 MR. CURLEY: Your Honor, I need to approach, trust me
2 on this.

3 THE COURT: All right. We will take a sidebar.

4 (Proceedings at sidebar.)

5 THE COURT: Okay.

6 MR. LEO: 64 is the page, not 164.

7 MR. CURLEY: Here is the problem, we have two
8 different transcripts, we have one that is the one that we got
9 from the Court Reporter, and these guys have what they call a
10 corrected transcript, which we don't seem to have. I have
11 never experienced this before.

12 THE COURT: You mean corrected like there was a back
13 page filled out, an errata sheet?

14 MR. MEDGEBOW: I can do this. Your Honor, there were
15 several typos throughout the original transcript. We made all
16 parties aware of this, we made the Court Reporter aware of this
17 as well.

18 THE COURT: Corrections were made by whom?

19 MR. MEDGEBOW: By the Court Reporter. All parties
20 are, in emails, aware of these corrections that happened.

21 MR. LEO: They were requested.

22 MR. MEDGEBOW: They were requested, we have email
23 communications regarding -- the only substantive changes,
24 typos, because of the typos, one page appears to be off.

25 It is in here, it is a page off somewhere.

1 MR. CURLEY: I am sure -- I am not doubting anything
2 you are saying.

3 THE COURT: If it is just a typo issue, I wouldn't
4 think it would be too far off a page. Why don't you look at
5 the transcript Mr. Curley has and show him where it is.

6 MR. CURLEY: They say line and page, and I look at it
7 and it is not what they are saying. I can't follow this.

8 MR. MEDGEBOW: In the interest of moving forward, I
9 can email you or put on a USB the corrected transcript right
10 now so you can pull it up on the computer.

11 MR. CURLEY: That is great.

12 MR. LEO: It is one page off, your Honor. The
13 corrected is 64, it is 63, and it is the same question. "Would
14 you say social media is required" -- you see that right there.
15 The answer is, "I don't know."

16 MR. MEDGEBOW: I will try to get that for you right
17 now. Depending on how long we are going --

18 MR. CURLEY: Today, maybe you could show me yourself
19 and say this is what --

20 THE COURT: Question now: How much longer are you
21 going to be taking with the witness on direct examination?

22 MR. LEO: How long have we been going?

23 THE COURT: I can tell you exactly.

24 MR. LEO: I would like to get this over in another
25 hour.

1 *THE COURT:* Do you think could you shoot for 5:30?

2 *MR. MEDGEBOW:* We can't limit ourselves to 5:30. We
3 have four hours reserved on this witness. We don't
4 anticipate -- we cannot limit ourselves to 45 minutes.

5 *THE COURT:* Do you know how much longer you have from
6 your outline, counsel?

7 *MR. LEO:* I can run and grab it.

8 *THE COURT:* Approximately.

9 *MR. LEO:* I do not know where I am at.

10 *THE COURT:* Let's proceed.

11 (Sidebar concluded.)

12 *THE COURT:* You may proceed.

13 *BY MR. LEO:*

14 *Q.* When we left off, we were talking about this question.
15 Does this refresh your recollection?

16 *A.* Can I look at it again?

17 *Q.* Yes.

18 *A.* Okay.

19 *Q.* A moment ago you said that -- what was your answer, I'm
20 sorry?

21 *A.* What was the question? I'm sorry.

22 *THE COURT:* See, this is what happens.

23 *BY MR. LEO:*

24 *Q.* Your answer was case-by-case?

25 *A.* Remind me of the question.

1 Q. Would you say social media is required to be recorded on an
2 outside activity form? Do you remember?

3 A. Right now I answered case-by-case. In the deposition I
4 answered "I don't know."

5 Q. Which one is it?

6 A. Can I tell you something? I am at another institution now,
7 this is a long time ago, I am going to guess case-by-case, I
8 believe it is case-by-case. If I didn't know in May, now I
9 believe it is case-by-case. I am not perfect, I am not saying
10 the same answers.

11 Q. Did the outside employment/professional activity policy
12 confuse you when you were at FAU?

13 A. There was some confusion that faculty had and there were
14 times we needed to get greater clarification.

15 Q. When you say some confusion, there was a lot of confusion,
16 wasn't there?

17 A. I don't know how to differentiate between some and a lot.

18 Q. You were the dean of the College of Arts and Letters?

19 A. Yes.

20 Q. All the faculty reported to you?

21 A. Yes.

22 Q. You were responsible for explaining policies and
23 regulations at the university for the faculty?

24 A. Yes.

25 Q. You received a lot of requests for this, didn't you?

1 A. There were a lot of times we had a lot of conversations, we
2 had meetings with the chairs of the college when this was
3 discussed. I don't know how to characterize a lot or some.
4 When we sought guidance from Dr. Alperin, we would get it, and
5 that would clear up some of the confusion that people had.

6 Q. With respect to the confusion about this policy, it wasn't
7 just faculty members that were confused; would you agree?

8 A. It is hard to answer that question.

9 MR. CURLEY: Objection, your Honor, calls for
10 speculation and probably hearsay.

11 THE COURT: Well, if your answer depends on what other
12 persons told you, that would be hearsay generally speaking,
13 without knowing the individual people. So, maybe you would
14 want to think about how to rephrase the question.

15 BY MR. LEO:

16 Q. Faculty members of the university are employees of the
17 university?

18 A. Yes.

19 Q. Administrators are employees?

20 A. Yes.

21 Q. When they ask you about policies, that is within the scope
22 of their employment?

23 A. Yes.

24 Q. Did you receive requests for clarification from faculty
25 members?

1 MR. CURLEY: Again, hearsay.

2 THE COURT: That does not fall under 801(d)(2). There
3 is probably another way you could ask the question. The
4 witness should not be testifying what a faculty member said.
5 That is, in essence, what it is going to come down to whether
6 it was within the scope of that relationship. So, if you know.

7 MR. LEO: We will get more specific, your Honor.

8 BY MR. LEO:

9 Q. I will show the witness what is marked 32-C for
10 identification purposes only at this time.

11 If you could read the document and let me know when you
12 have had a chance to review it.

13 A. Okay, I reviewed it.

14 Q. Who is Linda Johnson?

15 A. Linda Johnson was the associate dean for the college.

16 Q. She was a subordinate of yours at FAU?

17 A. Yes.

18 Q. She was an administrator of the school?

19 A. Yes.

20 Q. And 32-C, this is an email between you and Linda Johnson;
21 is that right?

22 A. Yes. It is from her to me.

23 Q. And all the people who are identified in this exchange --
24 this is two pages, looks like maybe three, four or so emails,
25 right?

1 A. Uh-hum. Right.

2 Q. All of the people that are identified in this document are
3 employees of Florida Atlantic University, at least they were in
4 March 2013; is that right?

5 A. Yes, to the best of my knowledge.

6 Q. Everybody included in the communication, they were
7 communicating because that was their job, right?

8 A. I guess so, yes. I would imagine so.

9 MR. LEO: Your Honor, at this time I move 32-C into
10 evidence.

11 THE COURT: Are you looking at all of 32-C or the top
12 part?

13 MR. LEO: We move the entire 32-C.

14 THE COURT: Any objection?

15 MR. CURLEY: Hearsay, relevance and cumulative.

16 THE COURT: Well, I think it falls within 801(d)(2).
17 Certainly the bottom part, which is from Diane Alperin, and the
18 top part, I think the witness sufficiently laid a foundation
19 with respect to the statement by Linda Johnson.

20 So, the Court determines, under 801(d)(2)(D), that it
21 is not hearsay. The Court overrules cumulative and
22 overrules -- what was the other one, relevancy?

23 MR. CURLEY: Yes.

24 THE COURT: Overrules relevancy, that can be addressed
25 on cross.

1 MR. LEO: May I publish?

2 THE COURT: Yes. 32-C is admitted over objection.

3 (Whereupon Plaintiff Exhibit 32-C was marked for evidence.)

4 BY MR. LEO:

5 Q. I direct your attention to the top message here from Linda
6 Johnson.

7 You said she was associate dean?

8 A. Yes.

9 Q. So she is underneath you?

10 A. Correct.

11 Q. Was she one of Professor Tracy's supervisors?

12 A. No. She reported directly to the chair of the department,
13 School of Communication and Multimedia side.

14 Q. David Williams?

15 A. Correct.

16 Q. And he is on this email as well?

17 A. Yes.

18 Q. Who were all of the individuals, if you could explain to
19 the jury?

20 A. Taina Teran and was my administrative assistant. Aimee
21 Arias was the chair of the Department of Political Science, Ann
22 Branama, Department of Sociology, Barclay Barrios and Rebecca
23 Lautar, Department of Music, Ben Lowe, Department of History,
24 and David Williams, Director of the School of Communication and
25 Multimedia Studies. Desmond Gallant, Director of Department of

1 Theater and Dance, Eric Berlatsky, Chair of the Department of
2 English. Michael Harris was the Chair of the Department of
3 Anthropology and interim Chair of the Department of Philosophy.
4 Marcella Munson, the chair of Languages, Linguistics and
5 Comparative Literature, and Michael Horswell was another
6 associate dean.

7 Q. These people that are copied on the exchange, they are
8 administrators at FAU at this time?

9 A. Correct.

10 Q. When Linda Johnson says "this does clarify some questions
11 that I had, while this is longer and more detailed, it does
12 clear up some questions as to what needs to be reported and the
13 benchmarks for reporting," what was she referring to at that
14 time?

15 A. I believe she would be referring to what was in the email
16 below that from Diane Alperin.

17 Q. And what was that?

18 A. Can I see that again?

19 Diane Alperin sent out to the deans, I am telling you what
20 is here, some drafts of revised outside employment/professional
21 activity documents.

22 Q. What documents were they?

23 A. Outside employment/professional activity documents.

24 Q. Was it a new document or a new --

25 A. It looks -- based on what she writes here, it looks like it

1 would be a revision of these documents.

2 Q. So in March 2016, administrators are circulating outside
3 activity revision documents?

4 A. Drafts of those revisions, yes.

5 Q. I see here it says -- there is a March 4 email and it talks
6 about a memo and explanation. Do you see that?

7 A. Yes, I do.

8 Q. And Linda Johnson, she replies to this being forwarded to
9 her. Is that what that was?

10 A. Yes.

11 *THE COURT:* Can you take off the screen, the bottom
12 part of the email? If you could take that off, we had not gone
13 that far down. We had gone as far as Diane Alperin.

14 I don't believe -- is there an objection from the
15 Defense as to the bottom part of the email from Arcadia
16 Betancourt or not?

17 *MR. CURLEY:* I am not sure I am seeing what you are
18 seeing.

19 *THE COURT:* The same document, I didn't realize there
20 was a third page, we didn't address that. So, I know you had
21 an overall objection, I overruled --

22 *MR. CURLEY:* I only have two pages.

23 *THE COURT:* Are we on 32-C? It is the second page,
24 second page. Was there an objection to that encompassed within
25 your overall objection now that I let page one in?

1 MR. CURLEY: Yes, it doesn't matter to us.

2 THE COURT: I just noticed that was actually --

3 MR. CURLEY: I do appreciate your asking. That is all
4 right. At this point, it completes the document.

5 THE COURT: All right. You can put it back up on the
6 screen.

7 BY MR. LEO:

8 Q. Going back, Linda Johnson, she is replying to this email
9 that you forwarded to her with some documents?

10 A. No. Linda -- it doesn't look to me like Linda attached any
11 documents.

12 Q. I am referring to her reply.

13 A. I forwarded what Diane sent saying "please review and bring
14 input to forum for discussion." And she replies, "this does
15 clarify some of the questions that I had."

16 Q. So, you said bring it to the forum?

17 A. Yes.

18 Q. Was there a forum in early 2016 about the outside
19 professional activity policy?

20 A. Forum refers to the chairs' forum we had in the college, we
21 had them every other week unless there is a big conflict. All
22 of the people on the email would attend. We discuss a whole
23 range of items that were relevant for the college, so, outside
24 activity forms, and these revisions, I believe were on an
25 agenda for one of the forms. I don't know the date.

1 Q. And she says this does clarify questions that I have.

2 Does this refresh your recollection as to the questions
3 Linda Johnson had about the outside activities policy?

4 A. No, it doesn't. I don't remember her questions.

5 Q. You see she says, "it does clear up some questions as to
6 what needs to be reported and the benchmarks for reporting"?

7 A. Right, that is what she said.

8 Q. And do you remember what questions she had about what needs
9 to be reported?

10 A. I don't at this time, no.

11 Q. I am going to show you Plaintiff's Exhibit 14, it is
12 already in evidence.

13 Do you recognize this document?

14 Would you publish?

15 Do you recognize this?

16 A. I understand what it is. Yes, I am sure I saw it back when
17 it was first produced.

18 Q. This is the additional explanation provided to FAU
19 employees in 2016, after Professor Tracey was fired; isn't that
20 right?

21 A. This dates from June 2016, I believe professor Tracey was
22 terminated in January 2016. Yes, this would have been produced
23 after his termination.

24 Q. So, let me get this straight. Professor Tracy is
25 terminated in January 2016, officially, right, for not

1 complying with the outside activity policy?

2 A. He was terminated for insubordination.

3 Q. For not turning in forms for the blog?

4 A. There was more to it than that. Yes, if you would like to
5 say that, that was one of the reasons.

6 Q. He didn't report his blog on the reported professional
7 activity form; is that right?

8 A. That is correct, he did not report his blog.

9 Q. And then later, an additional explanation about the policy
10 with respect to that form is given to all employees at the
11 university?

12 A. That appears to be what happened. I didn't create this
13 policy or form or send it out. That looks like what happened.

14 Q. Why didn't the university give Professor Tracy an
15 additional explanation?

16 A. The form came out in June, so he wasn't there when it came
17 out, that is why he didn't see this.

18 Q. Did they wait until after he was fired to give it out?

19 A. Yes, it came out in June, and he was terminated in January,
20 so that would have been after.

21 Q. Was that on purpose?

22 A. I have nothing to do with this coming out, so I don't know.

23 Q. And in 2015, you knew there were changes under way with
24 respect to the outside activities policy?

25 A. I knew there were revisions, yes, being planned and

1 discussed.

2 Q. In 2016, Dr. Tracey was disciplined and terminated under
3 this policy, and you knew there were revisions in the policy?

4 A. I knew it was being discussed and it was in the
5 administrator's office, the faculty we saw, steering committee,
6 deans, so it was a process.

7 Q. One of those changes included changing the requirement for
8 reporting a financial interest to -- do you see that right
9 there on the monitor?

10 A. Which page are you on?

11 Q. If you look at the monitor.

12 A. The monitor.

13 Q. They changed it from 10,000 to 5,000?

14 A. I honestly would need to review the former set of documents
15 as well as this to confirm it was changed from -- what did you
16 say -- ten to five.

17 Q. I am asking you if that is what happened.

18 A. I don't recall with any specificity.

19 Q. It is a very complex policy, I believe you testified
20 earlier, right?

21 A. I don't remember if I said it was a complex policy.

22 Q. It is not just a collective bargaining agreement, this
23 policy, is it?

24 A. Could you rephrase the question? What is the question?

25 Q. This policy is more than just a collective bargaining

1 agreement, isn't it?

2 MR. CURLEY: Your Honor, the question is vague. What
3 policy are we talking about?

4 THE COURT: Rephrase and clarify.

5 BY MR. LEO:

6 Q. The conflict of interest/outside activity policy is
7 complex, right?

8 A. Are you referring to this document?

9 Q. Sure.

10 A. Okay. I don't --

11 Q. This document is dealing with the policy I just named,
12 right?

13 A. Could you show me that policy? This just says explanation.
14 Is there a copy of the revised policy?

15 Q. I am not sure.

16 A. I don't have it in front of me.

17 Q. I am asking you if this policy is more than what is in the
18 collective bargaining agreement. You see right here where it
19 says paragraph two, it talks about Florida Statute 112, Federal
20 regulations?

21 A. You know, I am not an expert on the collective bargaining
22 agreement. I would be happy to look at it and examine it. It
23 looks like -- additional explanation sounds like it is fleshing
24 out and making more clear the policy that was revised.

25 Q. Initial explanation would mean to me because the policy is

1 not clear; is that right?

2 A. I can't clarify why additional explanation is needed, that
3 would be decided by the Provost's office.

4 Q. Let me show you what is marked Plaintiff's 23 for
5 identification only.

6 *THE COURT:* What exhibit is this?

7 *MR. LEO:* Plaintiff's 23.

8 *BY MR. LEO:*

9 Q. Do you recognize this document?

10 A. Yes, yes, I do recognize it.

11 Q. What is this?

12 A. So, this is a memorandum from the Provost to all the
13 faculty.

14 Q. And when was this --

15 *MR. CURLEY:* We need a foundation for this.

16 *BY MR. LEO:*

17 Q. Did you receive this memorandum when you were working at
18 FAU?

19 A. I am sure I did. I can't tell you what date, but I am sure
20 I did.

21 Q. You say it was from the Provost's office?

22 A. Yes, Gary Perry was and is still the Provost.

23 *MR. LEO:* Your Honor, at this time we move what is
24 marked 23 into evidence.

25 *THE COURT:* Any objection?

1 MR. CURLEY: Same objections as before, hearsay,
2 relevance and now we are into June 2016, far afield here.

3 THE COURT: I will overrule on relevance, and I --
4 unless there is a question whether Gary Perry falls within
5 801(d)(2)(D).

6 MR. CURLEY: There is no question.

7 THE COURT: He does?

8 MR. CURLEY: He would.

9 THE COURT: I overrule on hearsay if the entire
10 statement was made by him, which it looks like it was.

11 So, I will overrule the objection and allow 23 in over
12 objection.

13 MR. LEO: May I publish?

14 THE COURT: Yes.

15 (Whereupon Plaintiff Exhibit 23 was marked for evidence.)

16 BY MR. LEO:

17 Q. This says outside employment/professional activity form
18 reporting requirements as they relate to faculty. Again, this
19 is an explanation to provide clarification on the necessary
20 employment/professional activities that must be reported to the
21 university using designated forms, right?

22 A. Yes, that is what it says.

23 Q. Could you read -- multiple explanations were provided to
24 the faculty regarding the outside professional activity form
25 after Professor Tracey was fired?

1 A. This is four pages long, it does list a number of
2 clarifications.

3 Q. So, you agree this memorandum was provided after Professor
4 Tracey was fired, right?

5 A. Yes.

6 Q. Can we scroll down to the bottom of this, all the way down.

7 We are talking about the complexity of this policy. Would
8 you agree with me all the documents referenced by the Provost
9 in this memorandum reflect the extent, perhaps, of the conflict
10 of interest regulation at FAU?

11 A. It looks pretty comprehensive.

12 Q. Would you agree with me Article 19 is just one buried in
13 here towards the bottom?

14 A. Yes, I see Article 19 is one of the items that is a
15 document for reference.

16 Q. Would you agree with me the form that Professor Tracy said
17 his blog shouldn't be on is not part of the collective
18 bargaining agreement?

19 MR. CURLEY: Objection, your Honor, unless he is going
20 to have the witness read the whole document.

21 BY MR. LEO:

22 Q. If you know.

23 THE COURT: I am not the sure what the question or
24 objection is quite honestly.

25 Restate the question.

1 BY MR. LEO:

2 Q. The form here at the top of the document for reference
3 here, do you see that on the monitor?

4 A. Yes.

5 Q. This form is not part of Article 19, is it? It is listed
6 separately for a reason right here on this document; is that
7 right?

8 A. I didn't write this document, I didn't list these in any
9 particular order. I can't answer that.

10 Q. And all these things listed here, this additional
11 explanation number two, that was a document we just had up,
12 right, the previous document?

13 A. Yes, the title of the previous document matches the first
14 two lines under D.

15 Q. What exhibit number is that you are reading from?

16 A. Exhibit 14.

17 Q. Plaintiff's 14?

18 A. Yes. The title of this is the same as the first two line
19 under D.

20 Q. Plaintiff's 14 is right here, for the record, of the
21 form -- Florida Atlantic University professional/outside
22 activity form.

23 Would you agree that is Plaintiff's 15?

24 A. It says Plaintiff's 15.

25 Q. And those two documents are not part of the collective

1 bargaining agreement, right?

2 A. So, I would say that the first two lines under D are not
3 two separate things, it is one thing. The Florida Atlantic
4 University reported outside activity form is Exhibit 14.

5 Q. You are saying that this is one document, this whole --

6 A. Correct.

7 Q. How do you know that?

8 A. I don't know that. I am guessing that, making a good
9 guess, because the title of this document perfectly matches the
10 words of these first two lines.

11 *THE COURT:* Okay. We don't want you to be put in a
12 position of having to guess.

13 I ask counsel to restrict the questions to that which
14 the witness has knowledge of, and ask first whether she has
15 knowledge. If she doesn't, it would save the time of asking
16 the actual question, because we don't want anyone in the
17 position of guessing or speculating.

18 *BY MR. LEO:*

19 Q. It looks like you are right --

20 *THE COURT:* Counsel shouldn't be making statements or
21 testifying. Whatever the next question is, pose the next
22 question, please.

23 *BY MR. LEO:*

24 Q. Down here is where the forms are, at the bottom?

25 A. Yes, the forms and then there is a colon, and three forms

1 listed, it looks like.

2 Q. And again, this was not provided to Professor Tracy before
3 he was disciplined in 2015?

4 A. This document came out in June of 2016, and he had already
5 left the university at that point.

6 Q. Professor Tracy's discipline had nothing to do with the
7 timeliness or the completeness of the reported outside
8 employment form, did it?

9 A. Um-m-m, it did have -- his discipline did have to do with
10 the timeliness and completion, or lack thereof, of the outside
11 activity forms.

12 Q. Are you saying Professor Tracey was not disciplined for
13 what he was doing on his blog?

14 A. The content of his blog was never a discussion point.

15 Q. So, he wasn't fired because of what he was saying on his
16 blog; is that what you are saying?

17 A. That is correct, he was not fired because of what he was
18 saying on his blog.

19 Q. Who is Jeffrey Morton?

20 A. Jeffrey Morton is a professor of political science in the
21 Department of Political Science.

22 Q. Is he your hero?

23 A. Is he my hero?

24 Q. Yes.

25 A. I respect him, he is a colleague.

1 Q. I will show you what is marked as Plaintiff's 44. Take a
2 look and let me know when you have had a chance to review that.

3 MR. CURLEY: Your Honor, this is subject to a prior
4 ruling.

5 THE COURT: The entire document or a portion of it?

6 MR. CURLEY: The top portion, front page. And then,
7 obviously, there is a foundation issue with the rest of it, but
8 my understanding is you addressed this earlier.

9 THE COURT: Well, we would have to discuss that. It
10 might be a good time to take a break. It is getting late.

11 MR. LEO: This is a good breaking point, your Honor.

12 THE COURT: All right. There is a conflict, one of
13 the jurors has to go to school. Let's let you go right now.

14 That was a note that our juror number one has a test
15 that she must take, so we will excuse our jurors with the same
16 instructions not to discuss the case, not to have any
17 interaction with anyone associated with the case, not to do any
18 research.

19 Do well on your test. Those not well, feel better and
20 we will see you back at 9:00 a.m. Thank you for your patience,
21 have a nice evening.

22 *(Thereupon, the jury leaves the courtroom.)*

23 THE COURT: All right. So, this Exhibit 44, let's
24 take that up. I don't have any record of a prior ruling on
25 Exhibit 44, so you will have to refresh the Court's memory. If

1 you believe there was a particular time -- I have a list of
2 various rulings that I made and which exhibits those exhibits
3 apply to, but I am not seeing readily that any of those rulings
4 directly address Plaintiff's Exhibit 44.

5 *MR. FEICHT:* Roger Feicht on behalf of the Defense.
6 This particular exhibit has not been ruled on, but it is the
7 same issue as other emails that have been ruled on. It is
8 hearsay, and until they establish Jeffrey Morton is speaking in
9 his employment as a professor with the Department of Political
10 Science, until they establish that, it is not an admission.
11 Consistent with that, we need to establish that.

12 What they are trying to do here is use Professor
13 Morton's statement not within the scope of his employment and
14 trying to impute those to the university. He voluntarily
15 provided his personal opinion to the *New York Times*, that is
16 not within the scope --

17 *MR. LEO:* Your Honor --

18 *THE COURT:* Wait, you cannot talk at the same time as
19 anyone else. So, stop, let me wait to see if counsel is
20 finished. You may proceed.

21 *MR. BENZION:* There is a witness in the courtroom,
22 your Honor.

23 *THE COURT:* Okay.

24 The document was shown to the witness, was it not?

25 *MR. BENZION:* Now she is hearing counsel's argument

1 about the objection.

2 THE COURT: Would you like the witness to step
3 outside?

4 MR. BENZION: Yes. I apologize.

5 MR. CURLEY: May she be excused?

6 THE COURT: Yes. Dr. Coltman, you may be excused.
7 Return at 9:00 a.m. tomorrow. I want to remind you that you
8 remain under oath, do not discuss your testimony with anyone.

9 THE WITNESS: Thank you.

10 THE COURT: Have a nice evening.

11 *(The witness exits the courtroom.)*

12 THE COURT: Okay, for starters, let's break the
13 document down.

14 The top of the document is from Heather Coltman to
15 Jeffrey Morton, the rest of the document is from Jeffrey Morton
16 to Joshua Glanzer. So, you are now arguing -- and then there
17 is another part that is, yes, two different emails that look
18 like from Jeffrey Morton to Joshua Glanzer.

19 Yes, consistent with the rulings the Court has made,
20 if there is going to be an attempt to admit a document that
21 includes a statement made by somebody else, it must be
22 established, just as I had you do with that one exhibit, the
23 big exhibit of Dr. Coltman's notes where you had to go through
24 each portion of the notes, Exhibit 2, and make your proffer
25 about whether they were made within the scope and

1 responsibilities of that particular person's employment with
2 the university. So, that foundation would need to be laid with
3 respect to Jeffrey Morton for that part of the Exhibit 44.

4 And then there is the top part which is one line from
5 Heather Coltman to Jeffrey Morton. I don't know whether that
6 is being objected to; and if so, what the grounds are for that.

7 Is that being objected to as well?

8 *MR. FEICHT:* Yes, same basis, she is no longer a
9 party, it is hearsay. It is her telling another professor --
10 additionally, 403, unduly prejudicial, using a hearsay document
11 to try to establish that the university, the Defendant, is
12 agreeing with Professor Morton's statement. It is hearsay
13 within hearsay and unfair and prejudicial.

14 *THE COURT:* Response.

15 Why don't you start with how you are going to
16 establish, if you were intending to, that Jeffrey Morton's
17 statement comes in.

18 *MR. BENZION:* It establishes policies of the
19 university, 801(d)(2)(D).

20 *THE COURT:* With this witness, Dr. Coltman?

21 *MR. BENZION:* Yes.

22 *THE COURT:* Well, what is your proffer? What do you
23 expect she will tell you about Jeffrey Morton's
24 responsibilities and how does what he wrote come within the
25 scope of his responsibilities?

1 MR. BENZION: I don't know if I could proffer what she
2 would say. I am not sure she was deposed with respect to this
3 article, but we think as the dean that she can testify about a
4 professor's responsibilities at the university, and with
5 respect to --

6 THE COURT: Okay, let's say she can testify about the
7 responsibilities, so she may be able to tell us what about
8 Jeffrey Morton, he is what?

9 MR. BENZION: He is a professor and he was authorized
10 to give a statement like this to multiple media outlets.

11 MR. FEICHT: We dispute that vigorously.

12 THE COURT: What we will do with this is, we will have
13 Dr. Coltman and you can do a couple minute proffer, so let me
14 make a note. So, the first thing is going to be a proffer from
15 Dr. Coltman.

16 MR. CURLEY: Do you want me to see if she is still
17 here?

18 THE COURT: Yes, that would be a good idea.

19 MR. FEICHT: While we are waiting, your Honor, as far
20 as upcoming witnesses, and correct me if I am wrong, I believe
21 more witnesses have been released as far as updating the trial
22 plan.

23 THE COURT: You can tell me about that. When you say
24 released, they are not going to be called?

25 MR. LEO: Lenz and Beetle will not be called.

1 *THE COURT:* Timothy Lenz and Christopher Beetle will
2 not be called.

3 *MR. CURLEY:* I think we lost her.

4 *THE COURT:* That is too bad.

5 First thing in the morning we will get a proffer from
6 Dr. Coltman outside the jury's hearing as to whether -- do you
7 know what his position was, what his scope and responsibilities
8 were, and whether she has knowledge what he wrote in the email
9 to Joshua Glanzer, including Heather Coltman, fell within the
10 scope of his responsibility such that he was authorized to make
11 this statement contained in the two emails, December 18, 2015,
12 at 10:32 a.m., and December 18, 2015, at 10:47 a.m., and we
13 will see what she says.

14 Down at the very bottom there is something from
15 Jeffrey. Jeffrey -- also from Jeffrey Morton to Mr. McPhate.

16 So, it looks like there is something to Josh Glanzer
17 and also to Mr. McPhate. Is that all part of the same email?

18 *MR. FEICHT:* It appears so. I do not know who Mr.
19 McPhate is.

20 *THE COURT:* Depending on what she says, that will
21 dictate whether it comes in as 801(d)(2)(D), within the
22 scope -- made by a party's agent or employee made about a
23 matter or scope of that relationship or whether it existed or
24 it doesn't.

25 If it doesn't, if she is not able to make the adequate

1 proffer to satisfy that, then it won't come in.

2 Okay. So, let's find out, then, about how much
3 longer, based on looking at your notes, you think you will be
4 with Dr. Coltman.

5 MR. LEO: At least an hour, hour and a half.

6 THE COURT: What other areas are you covering with her
7 that haven't been covered?

8 MR. LEO: With respect to her role in 2013 and
9 particularly 2015, which is where I was going. That is the
10 extent of it, early 2016, involving her -- concerning her
11 involvement and the statements she made.

12 THE COURT: Okay. So, we have told the jury that the
13 latest they would be here was December 12th.

14 So, what I would like the parties to do, counsel to do
15 is to -- it may be time for me to get a revised joint trial
16 plan showing me how trial will be concluded on December 12th.
17 Okay?

18 That is what I told the jurors. That would mean we
19 would have been in trial for the full amount of time because we
20 started on Wednesday, the 29th, right. One, two, three, four,
21 five, six, seven, eight, nine, ten -- that is ten days.

22 This is not uncommon, don't feel this is a punitive
23 measure I am taking. Often in longer trials where trial plans
24 change -- and already we see that it is changing because you
25 are eliminating a few, but we want to make sure Defense has its

1 opportunity to present its case on a day short of day ten or
2 nine.

3 So, what I would like is to have a revised trial plan
4 that shows me on December 12th that is an entirely reasonable
5 date. That is a date you gave me, that is the date I told the
6 jury. No one has told me that ten days isn't adequate, but I
7 am getting a little concerned because, you know, we are only on
8 our third witness.

9 I know we had Kajiura, and I understand these are big
10 witnesses and the other ones are smaller. I want to see it
11 laid out in a trial plan, it would give me greater comfort
12 knowing that.

13 I ask counsel to work together on that, and submit a
14 revised trial plan that shows me how we get this to the jury by
15 December 12th.

16 When would be a reasonable time for you to be able to
17 get that to the Court?

18 *MR. LEO:* We could circulate a draft tonight and
19 hopefully by tomorrow morning. In light of some of the
20 evidence coming in, we can excuse Linda Johnson.

21 *THE COURT:* Let me make a note of that.

22 *MR. LEO:* I will confer with counsel and try to excuse
23 some of the other professors given that it would be cumulative.

24 *THE COURT:* Good, that is helpful.

25 Let me make a ruling now on something the Defense

1 filed. The Court notes Defendant's trial brief at Docket Entry
2 424, which sought reconsideration of this Court's prior order
3 permitting Plaintiff to elicit testimony from certain FAU
4 employees over Defendant's objection that those employees are
5 not valid comparators. The Court's ruling was that such
6 objections are more appropriate for cross-examination, and the
7 Court was past the stage of applying the McDonnell-Douglas
8 framework and examining Plaintiff's evidence for valid
9 comparators.

10 The Court's prior ruling, which was focused on whether
11 Plaintiff would be excluded from presenting evidence at trial
12 stands.

13 The Defendant's arguments in the trial brief are not
14 premised on legal authority saying that the Court may or should
15 exclude witnesses at trial because the Court concludes that
16 witnesses are not similarly situated enough to the Plaintiff.
17 Relevancy remains the proper determination for that question.

18 Instead, the Defendant's authority stands for the
19 proposition that if Plaintiff fails to introduce sufficient
20 evidence in support of his claims at trial, the Court must
21 grant judgment as a matter of law in favor of the Defendant.
22 Nothing in the Court's prior ruling will prohibit the Defendant
23 from making a motion for judgment as a matter of law, nor does
24 the Court's prior ruling preclude the Defendant from arguing
25 that the comparator employees are not sufficiently situated to

1 the Plaintiff and, as a result, judgment of a matter of law
2 should be entered in Defendant's favor.

3 That is on that motion contained in 424, that was one
4 remaining issue, and there is a proffer the Plaintiff wanted to
5 make on a ruling the Court already made.

6 I don't know what that was. Can you tell me what that
7 issue is?

8 *MR. BENZION:* This related to the faculty senate issue
9 and opening the door, and during Dr. Alperin's testimony, she
10 testified there were a number of options to the Plaintiff in
11 order to respond to the discipline that he was experiencing
12 from FAU and one of those options was that he could raise his
13 concerns in a faculty senate meeting, and ask for them to go to
14 an Academic Freedom and Due Process Committee.

15 And it is the Plaintiff's position that this is
16 precisely what was done at a faculty senate meeting. There was
17 great concern over the conflict of interest activities policy
18 in that meeting, and one of the faculty members in that meeting
19 suggested that the concerns over the application of the policy
20 be submitted to the due process committee.

21 Among those concerns was the faculty members' concerns
22 about the constitutionality of the policy and how it was being
23 applied to faculty members, and that request to submit those
24 concerns to the Academic Freedom and Due Process Committee was
25 denied in that meeting.

1 What Plaintiff intended to discuss with Dr. Alperin
2 was simply that such a request was made in 2015, conflict of
3 interest/outside activities policy and concerns around it be
4 submitted to the Academic Freedom and Due Process Committee and
5 that was denied, and not an option, really, for the Plaintiff.

6 *THE COURT:* You are saying the Plaintiff made a
7 request to submit his issue to the faculty senate meeting, and
8 the request was denied?

9 *MR. BENZION:* I apologize if I wasn't fully clear,
10 your Honor, it is that somebody else in the faculty senate
11 meeting asked these issues be submitted to the Academic Freedom
12 and Due Process Committee as suggested by Dr. Alperin and that
13 was denied.

14 *THE COURT:* Dr. Tracy didn't make that request.

15 *MR. BENZION:* That is correct.

16 *THE COURT:* Response.

17 *MS. GRIFFIN:* There is a lot that we disagree with.
18 Dr. Alperin's testimony was that he could have made a complaint
19 directly with the committee, not that he take it up to the
20 faculty senate. Certainly suggesting there is a committee he
21 could have complained to does not open the door to a ruling the
22 Court already ruled on. It is not opening the door.

23 The vast majority of that faculty meeting was not
24 relevant because it had to do with a different faculty member
25 who was not the faculty member asking for the situation to be

1 sent to the Academic Freedom and Due Process Committee. This
2 is irrelevant, completely going to create a trial within a
3 trial that has nothing to do with Dr. Tracy.

4 *THE COURT:* My ruling does stand on that particular
5 exhibit, and maybe you should state what that exhibit is for
6 the record. I think it was a series of exhibits that dealt --

7 *MR. BENZION:* Plaintiff's 27, I believe.

8 *THE COURT:* Right, and a few that went along with
9 that.

10 *MS. GRIFFIN:* 27, 28, 106, and the recording itself,
11 which is 67, along with any testimony about the faculty senate
12 meeting, your Honor.

13 *THE COURT:* Yes, that ruling stands. Of course,
14 nothing prohibits the Plaintiff from asking any appropriate
15 witness what requests Dr. Tracy did or did not make, what the
16 university did or did not do vis-a-vis those requests.

17 So, while the ruling stands with respect to the senate
18 meeting for the, I think, pretty extensive reasoning I put on
19 the record previously, nothing has changed. No door, in the
20 Court's view, has been opened, but nothing precludes Plaintiff
21 from making any inquiry of the appropriate witness about what
22 avenues Dr. Tracy may have pursued, such as seeking a certain
23 request or not, and whether it was denied or not, as long as it
24 is coming from the proper witness.

25 *MR. BENZION:* Yes, your Honor.

1 *THE COURT:* That takes care of that issue. I don't
2 think you need to brief anything. No one is briefing anything,
3 just work on a revised trial plan.

4 *MR. BLICKENSDERFER:* Steve Blickensderfer on behalf of
5 Plaintiff. We have been in the process of briefing the issue
6 on the similar comparators. To the extent that comes up at the
7 directed verdict stage, we may be filing a brief at that time.

8 *THE COURT:* If you want to anticipate the issues for
9 the judgment as a matter of law, directed verdict, I think it
10 is called -- 1001 is a judgment as a matter of law and 1 is a
11 directed verdict. That is not uncommon if you want your
12 argument ready to go in a written form, that is fine.

13 Unless I request written briefing on everything
14 else -- I think you appreciate it, and quite honestly, we would
15 ask that you don't need to file any more. It does make for a
16 lot of work and being in trial and ruling on written
17 submissions is hard in conjunction with the other 270 cases we
18 have, not that this one isn't the most important at this time.
19 It is for everyone here, including the judge.

20 Unless I request something in writing, that will
21 relieve the pressure on you, and I will -- for now, I don't
22 want to see anything in writing. If you want to prepare
23 something for the judgment as a matter of law phase, I am not
24 requiring it, if you want to do it, that is fine. I would like
25 to have the trial plan, how we are getting the case to the jury

1 by the 12th, if not sooner.

2 We will see everybody tomorrow morning at 8:45 a.m.

3 Have a good night.

4 *(Thereupon, the Court was recessed.)*

5 * * *

6 I certify that the foregoing is a correct transcript
7 from the record of proceedings in the above matter.

8
9 Date: December 29, 2017

10 /s/ Pauline A. Stipes, Official Federal Reporter

11 Signature of Court Reporter
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Pauline A. Stipes, Official Federal Reporter

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